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CITATIONS

286748—54——1

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 304

ELMER F. REMMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 3748–3777) is reported at 205 F. 2d 277.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1953 (R. 3778), and a petition for rehearing was denied June 30, 1953 (R. 3779). On July 17, 1953, by order of Mr. Justice Clark, the time for filing a petition for a writ of certiorari was extended to August 29, 1953. The petition was filed August 28, 1953, and was granted on November 16, 1953 (R. 3781). The jurisdiction

of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

Petitioner was convicted of wilfully attempting to evade income taxes for the years 1944 and 1945. The Government's proof of unreported income was based mainly upon evidence of annual increases in his net worth. The questions presented are:

1. Whether it was proper for the Government to present evidence of unexplained annual increases in petitioner's net worth in order to show that he had not reported all of his taxable income for the years concerned.

2. Whether the evidence was sufficient to warrant submission of the case to the jury and to support the verdict. The following specific factual issues are raised: (a) as to the "starting point" of the Government's net worth computation; (b) as to the inclusion of $15,000 in so-called "markers" in the net worth computation for the year 1945; (c) as to whether certain enterprises were owned by petitioner solely or in partnership with others. A question is also presented as to whether the jury was properly instructed on the latter issue.

3. Whether the trial court abused its discretion in denying petitioner's motions to inspect certain of his records held by the Government, in view of

his prior opportunities to examine these records and the belated filing of the motions.

4. Whether the case should be remanded to the district court for the purpose of holding a hearing to inquire into the facts concerning an alleged improper contact between one of the jurors and a third person.[1]

STATUTE AND RULES INVOLVED

Internal Revenue Code:

> SEC. 41. GENERAL RULE.
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> The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of calendar year.
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> (26 U. S. C. 1946 ed., Sec. 41.)

[1] On this issue, the Government does not oppose petitioner. See pp. 92–98, *infra*.

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

Federal Rules of Criminal Procedure:

Rule 16. *Discovery and Inspection*

Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The

order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just.

* * * * *

Rule 17. *Subpoena*

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(c) For Production of Documentary Evidence and of Objects

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

On April 3, 1951, an indictment in six counts was filed against petitioner in the United States District Court for the District of Nevada, charging violations of Section 145 (b) of the Internal Revenue Code. The first and second counts alleged that petitioner wilfully attempted to defeat and evade income taxes due and owing by himself

and his wife for the year 1944 in the amount of $27,379.08. The third and fourth counts charged evasion of his own and his wife's income taxes for the year 1945 in the amount of $11,090.34. The fifth and sixth counts charged similar evasion for the year 1946 in the amount of $117,129.62 (R. 3–8.) The trial began November 28, 1951, and lasted approximately three months. Petitioner was convicted on the first four counts, the jury failing to agree as to the counts involving the year 1946. (R. 88, 3667.) On February 29, 1952, he was sentenced to imprisonment for five years and fined $5,000 on each of the first four counts. The terms of imprisonment were made to run concurrently, but the fines were cumulative. (R. 89–91.) The conviction was affirmed unanimously by the Court of Appeals for the Ninth Circuit. (R. 3748–3777.)

A. THEORY OF THE GOVERNMENT'S CASE

The indictment charged that petitioner had attempted to evade income taxes by underreporting his and his wife's net taxable income. The theory of the evidence presented by the Government at the trial was that there were large annual increases in petitioner's net worth in 1944, 1945 and 1946; that the only reasonable explanation of these increases was that they represented current taxable income; and that the amounts of taxable income thus proved were considerably greater than the amounts reported by petitioner in his

own and his wife's returns. Petitioner was on a cash basis, and the net worth computation was made on the same basis. (R. 2621–2628, 2719–2728, 2760–2780; Br. 20.) The starting point of the net worth computation was December 31, 1943. According to the computation, petitioner's income for 1944, 1945 and 1946 was, respectively, $50,747.91, $71,065.40, and $254,285.42. In the respective returns for those years petitioner reported income of $19,000, $59,318.36 and $22,489.58.[2] (R. 3612–3613; Ex. 183.)

In the trial court petitioner moved for a judgment of acquittal on the ground that the net worth computation was an insufficient basis from which the jury could find that he had failed to report substantial portions of his taxable income for the years involved. The sufficiency of the computation was challenged on two principal grounds: (1) that the Government failed to prove that all of petitioner's assets as of December 31, 1943, were included in the computation, thus failing to establish a solid starting point (R. 2942–2970, 2982–2984, 3476–3477); and (2) that the Government failed to prove that certain ostensible partnerships were mere shams and were, in reality, sole proprietorships of petitioner[3]

[2] Petitioner and his wife split this income on the community property basis and filed individual returns. (R. 3519–3528.)

[3] In addition to his attack upon the computation as insufficient evidence of unreported income, petitioner also contended that the Gove nment had failed to show that his books

(R. 2970–2976, 3478–3483). The motion for acquittal was denied by the district court. (R. 3492). Both contentions were renewed, unsuccessfully, in the Court of Appeals. (R. 3762–3770.) In this Court petitioner again urges (Br. 26–31) that the evidence was insufficient to establish the starting point of the computation. He also now renews his attack (Br. 37–41) upon the sufficiency of the evidence as to the sole proprietorships, although this point appeared to have been abandoned in the petition for a writ of certiorari. (See Pet. pp. 2–4, 16–17, 26–31.)

B. EVIDENCE TO SUPPORT THE GOVERNMENT'S CASE

The evidence to support the conclusion that petitioner failed to report all his taxable income may be summarized as follows:

1. *Businesses in which petitioner had interests.*—During the taxable years involved in this case petitioner had business interests in the following enterprises:

NEVADA:

Cal-Neva, Inc., a lodge and gambling room astride the Nevada-California state line at the shore of Lake Tahoe (R. 1595);

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and records were inadequate, and that the use of the net worth method was, therefore, improper. (R. 2910–2916, 3465–3476.) This contention was renewed in the Court of Appeals (R. 3762–3763), and is one of the points raised in this Court (Br. 20–26).

SAN FRANCISCO:

B-R Smoke Shoppe, a horse race bookmaking establishment at 50 Mason Street (R. 1287–1288)—across the front of the building were general offices for all the San Francisco enterprises (R. 1662, 1667);

110 Eddy Street, a bar located at that address (R. 1382, 2076);

186 Club, a gambling room at 186 Eddy Street, devoted to draw poker and operating twenty-four hours a day (R. 643, 1970–1973);

Day-Night Cigar and Liquor Store, a cigar, liquor and magazine store located in the front of the building which housed the *186 Club* (R. 1451);

Menlo Club, a gambling house not far from the offices at 50 Mason Street, open twenty-four hours a day and operated in conjunction with a bar and restaurant[4] (R. 768–772, 1405, 3582);

Transit Smoke Shop, a combined gambling house, cigar and liquor store (R. 1478);

EL CERRITO:[5]

San Diego Social Club, a gambling casino (R. 1055);

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[4] The bar and restaurant are referred to in the record as "Tiny's Bar" or "Menlo Bar", and "Tiny's Restaurant" or "Tiny's Waffle Shop".

[5] This is a town located across the bay from San Francisco. (R. 742.)

21 Club, a restaurant and bar occupying the front of the building housing the gambling casino (R. 1055);

311 Club, another gambling club located across the street (R. 1117–1118).

As petitioner points out (Br. 34), the paramount issue at the trial was whether four of the San Francisco enterprises—*B-R Smoke Shoppe, 110 Eddy Street, Day-Night Cigar and Liquor Store* and *Menlo Club*—were his own sole proprietorships, or were bona fide partnerships between petitioner and his associates.

2. *Acquisition of the businesses.*—The majority of the businesses were acquired prior to 1944, the first of the years involved in this case. However, the amount of cash used to purchase these earlier interests was small in comparison with the sums similarly expended during 1944, 1945 and 1946.

In 1926 Graham, McKay and Hall borrowed money from a bank and bought the Cal-Neva Lodge. Petitioner contributed no money, but he was the active manager and he was given an equal share in the business. The lodge was incorporated in 1929 as *Cal-Neva, Inc.*, all four associates receiving about the same amount of stock. When Hall died around 1940 the corporation bought in his shares. (R. 1903–1906, 1929.)

Petitioner began to acquire his interests in San Francisco late in 1941. In December of that

year the *B-R Smoke Shoppe* was purchased as a going concern, petitioner paying the purchase price of $2,500 and supplying the original bank roll of $7,500 necessary for operation of the horse race book. (R. 1288–1290, 1347–1348.) Around August 1942 petitioner and his associates took over the tavern at *110 Eddy Street* in order to protect a $4,000 debt owed to petitioner by the proprietor, Clarence Bent, and petitioner spent a considerable sum on improvements. No one else put up any money except Arthur Pratt, who turned over $3,400 to petitioner after the two had reached an oral agreement that Pratt would receive a one-third interest. This money was used to pay some of the improvement bills. (R. 1383–1384, 1398, 2242–2246.) In March 1943 petitioner and his associates bought the combined *186 Club* and *Day-Night Cigar and Liquor Store* as a going concern. The sum of $16,000 needed for the purchase of the gambling club was obtained from Nealis and Kopstick and they were given a one-sixth interest in the business. Petitioner supplied about $6,000 for the purchase of the cigar and liquor store. Details of the transaction were handled by William Kyne, who acted as general manager for all the San Francisco enterprises. (R. 643–647, 1424–1427, 1451.)

Meanwhile, petitioner had begun to acquire interests across the bay in El Cerrito. In April or May 1943 he purchased the property which housed the *San Diego Social Club* and the *21*

Club. He provided the $25,000 required for the purchase, but the property was put in the name of his attorney because of the jealousy of other gamblers in that area. He operated the two businesses jointly with Pechart and Kessel, but there is no evidence that they provided any of the initial investment. (R. 742–746, 1109–1110.) In 1944 Pechart and Kessel set up another gambling house across the street, the *311 Club.* There is no evidence that petitioner contributed anything to this enterprise, but the 1944 partnership return shows him as a partner, and Pechart and Kessel testified that they gave him a five or ten percent "friendship bonus" because he did not approve of the new club. (R. 1115–1121, 1143–1147, 1161–1162.)

Acquisitions during the taxable years with which this case is concerned, 1944, 1945 and 1946, involved the outlay of considerable sums by petitioner. Arthur Pratt, not being able to discover how the tavern business at *110 Eddy Street* was being conducted, sold his interest to petitioner for $6,800 in March 1944.[6] (R. 2245–2270.) The $16,000 invested by Nealis and Kopstick in the *186 Club* was returned to them in installments as promptly as the money came in to the club, payment being completed early in 1944. The money was turned over to them by Kyne who got it from

[6] Pratt had borrowed $2,000 from petitioner in the latter part of 1943. He received an additional $4,800 when he sold his interest to petitioner in March 1944. (R. 2250–2252.)

a bank safe deposit box (Box 48) which was used as a general depository for the funds of all the San Francisco enterprises. (R. 1427–1428, 1518.) In 1945 petitioner purchased additional property contiguous to the *San Diego Social Club* in El Cerrito for approximately $12,000, and again title was transferred to his attorney. (R. 746–749, 754–756.) In April 1945 petitioner contracted with Gene Schriber to purchase the *Menlo Club* for $175,000 and took a ten year lease on the premises at a total rent of $219,000. Most of the El Cerrito property was used as security for the notes given by petitioner. The lease was put in the name of Billington, a boyhood friend and employee. Schriber received $75,000 of the purchase price during 1945,—a cash payment of $25,000 from petitioner at the time the contract was signed, and checks on the *Menlo Club* account amounting to $50,000 later in the year.[7] Cash for deposits to cover these checks was given to Maundrell, the club bookkeeper, either by petitioner or

[7] Schriber and Maundrell, both friendly to petitioner, testified that the total paid to Schriber in 1945 was only $50,000 instead of $75,000. Schriber himself had no record of the payments he had received. A page from the *Menlo Club* ledger, Exhibit 140, supported the testimony. However, there was evidence that Exhibit 140 had been substituted, prior to trial and while the ledger was in petitioner's possession, for the original record of the transaction, Exhibit 125C, which showed payment of $75,000 in 1945. (R. 1719–1740, 1796–1802, 1816–1824, 2466–2476, 2689–2715, particularly 1722–1729, 2689–2705.)

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by the club manager. A further payment was made in 1946. (R. 749–756, 768–784, 799–800, 1732–1733, 1817–1822, 2469–2478.) In November 1946 Gordon Partee asked petitioner to buy the *Transit Smoke Shop.* Petitioner told him to talk to Kyne, and Kyne gave him approximately $32,000 to complete the purchase. Petitioner supplied the money and Kyne obtained it from safe deposit Box 48, mentioned above. The business was ostensibly a partnership between petitioner, Partee and Kyne. Partee put up no money, but Kyne borrowed a little over $16,000 from the *Menlo Club* account to pay for his share and put this money into Box 48. (R. 1183–1193, 1474–1478, 1495–1496, 1523, 1566, 1586–1587, 1762–1763.)

In July 1946 petitioner entered into an agreement to buy all the stock of *Cal-Neva, Inc.,* from Graham and McKay for $466,666.66. Although there was at that time only $75,000 in the corporation, petitioner made a payment of $100,000 in September. (R. 1905–1910, 1917.) In November 1945 petitioner bought an interest in a New York night club for $12,000. Checks were drawn on the *Menlo Club* account for this amount and Maundrell, the bookkeeper, was given the cash for deposit. Petitioner told Kyne, who was then stationed in an army camp in North Carolina, to take a look at the place because Kyne had a "piece" of it. This was news to Kyne. The venture shortly failed and $8,000 of the original investment was returned, not to the *Menlo Club,*

but to petitioner. (R. 1379–1382, 1668–1669, 1836–1838.)

3. *Operation of the businesses.*—The San Francisco enterprises were purchased and launched, as has been seen, almost entirely with money supplied by petitioner. These businesses had a main office and a general manager. The books and records were, for the most part, kept by a single bookkeeper. And a common fund was maintained for the operation of all of them.

Kyne was the general manager of the San Francisco enterprises.[8] He handled the money and the records; he engaged the clerks and the bookkeepers, with the exception of Maundrell; and the managers of the various individual businesses were subordinate to him. (R. 1494, 1552, 1557–1558.) Most of his time was spent in the management of the *B-R Smoke Shoppe,* the bookmaking establishment. (R. 1290–1291, 1295–1297, 1349, 1356.) Each day, however, he visited the other locations for a few minutes to pick up the receipts and the gambling records. The records he stored in the main offices at 50 Mason Street; the receipts he placed either in the safe in the main offices or in safe deposit Box 48, to which

[8] The managers of the individual businesses were: *186 Club*, Busterna (R. 1971); *110 Eddy Street*, Cavani and Turner (R. 1385); *Menlo Club*, Ditto and Nelson in the gambling room, Maundrell in the office and restaurant (R. 1597, 1693, 1769); *Transit Smoke Shop*, Partee (R. 1196). Kyne, himself, managed the *B–R Smoke Shoppe* (R. 1356) and, apparently, the *Day-Night Cigar and Liquor Store* (R. 1452).

reference has already been made. (R. 1406, 1411, 1430–1432, 1694–1698.) If the money he had collected in one location was needed for the expenses of another, he used it for that purpose. (R. 1412.) He supplied data on the San Francisco enterprises to the person who prepared petitioner's individual income tax returns.[9] (R. 1533–1534.)

Slater was the original bookkeeper. (R. 1384, 1985, 2076, 2096.) Maundrell, who had been in charge of the dining room and hotel accommodations at *Cal-Neva, Inc.*, was brought to San Francisco in 1945 upon purchase of the *Menlo Club* and put in charge of the books of that establishment. He was described by Kyne as petitioner's bookkeeper. (R. 1392.) After Kyne's departure for the army [10] and the death of Slater, Maundrell became bookkeeper for all the San Francisco businesses with an office at 50 Mason Street.[11] (R. 1392, 1593–1601, 1637–1638.)

The main offices were located at 50–52 Mason Street, the same building which housed the *B-R Smoke Shoppe*. During 1944, 1945 and 1946 close to $10,000 was spent in remodeling the front of

[9] These returns were prepared by Mooney, a deputy collector in the Internal Revenue office in Nevada. Mooney took vacations in San Francisco, at petitioner's expense, and obtained the figures while there. (R. 876–892, 956, 1534.)

[10] Kyne was in the service from February 1945 to June 1946. (R. 1379.)

[11] The *B–R Smoke Shoppe* records were handled by Kyne, and during Kyne's absence by Pritchett (referred to in the record as Fritchett). (R. 1938, 1946–1947.)

this building into offices for petitioner, Kyne and Maundrell. The improvements were paid for by checks drawn on an account in the names of petitioner and Maundrell, in which Maundrell deposited receipts from the *Menlo Club* bar and restaurant and other funds given him by petitioner for particular purposes. These particular checks given in payment for the construction of the offices were covered by deposits of cash given to Maundrell for that specific purpose either by petitioner or by the manager of the gambling room at the *Menlo Club*. No account was set up on the *Menlo Club* books to reflect these transactions. (R. 1432, 1650–1657, 1662–1683, 1694–1699, 1744–1753, 2513–2518, 2660–2673.) A large safe was placed in the main office during 1944. Only petitioner, Kyne and Maundrell knew the combination, and there was a combination lock box inside to which only petitioner and Kyne had access.[12] (R. 1535–1537, 1696–1699, 1709–1714, 1943–1945, 2515, 3607–3608.) There was also a storeroom in the building which was used as a warehouse to keep whiskey for the San Francisco bars. (R. 1481–1482.)

Safe deposit Box 48, to which several references have already been made, was maintained in the names of petitioner and Kyne. It was used by Kyne as a depository for cash from all

[12] There were also safes at *110 Eddy Street* and at the *Menlo Club* which were used for overnight storage of the day's receipts. (R. 1411, 1536, 1716–1717, 2076, 2096–2097.)

the enterprises, and this cash was treated as a common fund and was used by Kyne wherever needed. (R. 1368–1369, 1411–1412, 1431, 1475, 1536, 1544–1545.) Other funds belonging to petitioner, not derived from any of the San Francisco enterprises, were also placed in Box 48 and were used by Kyne in the San Francisco enterprises as the need arose. (R. 1484.) This common treatment of the funds of all the businesses is further exemplified in the acquisition of the *Transit Smoke Shop* (*supra,* p. 13); in the use of the *Menlo Club* account standing in the names of petitioner and Maundrell to pay expenses at other locations and to pay petitioner's personal expenses (*supra,* p. 16; see R. 1650–1686); in the withdrawal of large sums from the *Menlo Club* by petitioner (R. 1414–1415, 1455); and in the transfer of equipment from one enterprise to another (R. 2071–2072). Kyne could not remember the amounts kept in Box 48. He said that he had kept a daily record but that he had given it to Slater. No record was available at the trial.[13] (R. 1536, 1559–1560.)

Petitioner himself was in Nevada each year during the period between April and October,

[13] In addition to Box 48, two other bank safe deposit boxes are mentioned in the record. Box 39813, acquired on February 24, 1943, in the names of Kyne and Pritchett, was used for overnight storage of the *B–R Smoke Shoppe* bankroll. (R. 1369, 1373–1374, 1939–1942.) Box 730, acquired in 1944 in the names of Kyne and Henry Clay (an alias for petitioner), was used only for storage of papers. (R. 1369–1370, 1536, 1558–1559.)

since Graham and McKay were absent from the state and had to leave the management of *Cal-Neva, Inc.,* entirely in his hands. (R. 1325–1326, 1906.) The gambling club in El Cerrito, the *San Diego Social Club,* was managed chiefly by men who were also employed by petitioner at *Cal-Neva, Inc.* Kessel, who testified that petitioner and Pechart were his partners in the business, said that he and Pechart were the active managers. However, Pechart said that he took no active part and that the management was in the hands of petitioner's men, and Kessel also admitted that these men were managers in the gambling room. The bookkeeper for Pechart and Kessel also testified that petitioner's men were operating managers. (R. 1063–1067, 1112–1114, 1128, 1135–1136, 1139, 1596.) The restaurant and bar in the same building, the *21 Club,* was managed by Billington, the boyhood friend of petitioner in whose name the *Menlo Club* lease was placed and who had also worked at the *110 Eddy Street* bar in San Francisco. (R. 787–792.) Cavani, who had originally been selected by petitioner as manager of the *21 Club* was switched to *110 Eddy Street* by petitioner upon the death of Clarence Bent.[14] (R. 2067–2071, 2083–2084.) The other gambling club in El Cerrito, the *311 Club,* was operated by Pechart and Kessel and the evidence does not indicate that

[14] Cavani had worked for petitioner as a bartender at *Cal-Neva Inc.*, for many years. (R. 2067.)

petitioner had any active part in the management, although the 1944 income tax return of the club listed him as a partner. The records of all three El Cerrito businesses had, however, been delivered to petitioner by Pechart about two weeks after the indictment in this case, and they were not available at the trial. (R. 1103–1104, 1138, 1142.)

4. *Ownership of the businesses.*—We have already referred (*supra,* p. 10), to the fact that at the trial the paramount issue was whether four of the San Francisco enterprises were bona fide partnerships, or sole proprietorships of petitioner. These were the *B–R Smoke Shoppe,* the bar at *110 Eddy Street,* the *Day-Night Cigar and Liquor Store,* and the *Menlo Club.* We shall summarize the evidence as to the ownership of these four, and reference will also be made to the similar treatment of some of the other enterprises.

The Government was forced to present its case through the testimony of the men who operated the San Francisco businesses, Kyne, Maundrell, Lando, Cavani, Busterna, Casselini and Partee, all of whom testified that they held partnership status in the particular businesses with which they were associated. With the exception of the *Transit Smoke Shop,* all of the so-called partnerships began, according to these witnesses, with oral agreements. All the oral agreements were between petitioner and *one* of the so-called part-

ners, and there is no evidence of any three or four way agreements. (R. 1400, 1513–1523, 1635.) Petitioner had, as we have seen above, contributed almost all the original capital as each new venture was launched. His associates testified that petitioner gave them "working interests" in return for the services they were to contribute. Each associate was assigned a certain percentage of the profits of each business in which he had received a share. These profits were not to be withdrawn, however, but were to be left in the business until a sufficient sum had been accumulated to repay petitioner the amount of his original investment. Meanwhile the profits were to be credited to the individual partners on the books, thus building up their "equities" in the business.[15] (R. 1341–1342, 1382, 1497–1523, 1634–1635.)

None of these oral agreements were reduced to writing until November 4, 1946, after internal revenue agents had already begun the investigation which led to the present prosecution.[16] On that date petitioner signed agreements with Kyne and Maundrell as to the *Menlo Club,* effective retroactively to May 1, 1945, the date the property

[15] Several of the so-called partners, Busterna, Casselini and Cavani, were extremely vague about their "working interests". (R. 1976, 1986, 2011–2016, 2026, 2078–2081, 2109–2110.)

[16] A written agreement was also drawn up between petitioner, Kyne and Partee for the *Transit Smoke Shop*, which was acquired November 21, 1946. (R. 1189–1190.)

was acquired by petitioner.[17] (R. 2115, 2123, 2152, 2163, 2454–2457, 3582–3583, 3585–3586.) Both Kyne and Maundrell stated that the written agreements were the same as their prior oral agreements. (R. 1503–1504, 1635.) The most pertinent portions of Kyne's agreement, substantially identical with Maundrell's, are as follows (R. 3582–3583; Ex. 113):

> Whereas, it is the desire of First Party to sell, assign and convey to said Second Party a 15% interest in and to said social room business and in and to said restaurant business; and
>
> Whereas, said Second Party is desirous of acquiring a 15% interest in and to said social room business and in and to said restaurant business; and
>
> Whereas, said 15% interest of Second Party in and to said social room and restaurant businesses shall not come into being until there shall have been paid to said First Party out of the profits of said businesses the sum of $175,000, the original purchase price of said businesses;
>
> * * * * *
>
> Effective as of May 1, 1945, First Party hereby does assign, transfer, set over and convey to William E. Kyne, Second Party herein, a 15% working interest in and to the profits derived from the operation of

[17] Maundrell testified that the other partners in the *Menlo Club* signed similar written agreements at the same time. These were not in evidence. (R. 1802.)

the aforesaid social room and restaurant businesses situated as aforesaid;

It is understood and agreed between the parties hereto that said working interest does not represent an actual interest in and to the assets of said business or in or to the leasehold in said premises; that is to say, all moneys credited to the account of Second Party pursuant to said working interest shall be applied on account of Second Party's payment for an actual interest in and to said social club business and restaurant business;

It is further understood and agreed between the parties hereto that an actual interest in and to said businesses and their assets shall not be acquired by Second Party until First Party has been fully reimbursed in the sum of $175,000;

First Party does hereby sell, assign, set over, transfer and convey to Second Party a 15% interest in and to said social club business and restaurant business and their assets upon the receipt by First Party of the sum of $175,000 representing the purchase price expended by First Party as more particularly hereinabove appears;

* * * * *

The following facts appear as to the treatment of the so-called partners' shares in the various businesses:

The supposed partners in the *B-R Smoke Shoppe* were petitioner, Kyne and Lando, and

it was petitioner who supplied all the capital. (R. 1346–1348.) Lando's duties were to fix the odds on horse races. (R. 1291, 1323.) He testified that he received no salary. (R. 1298.) The partnership return for 1944 showed that he was entitled to only $300 as his share of net income, and he testified that he thought 1945 was a loss year. (R. 1329–1330, 3530.) He stated that the partners had an accounting at the end of each year, but that he had never seen the partnership returns, and that he could not recall how much of an "equity" he had acquired by the end of 1946. (R. 1298, 1301, 1318.) Kyne was in charge of the records, the layoff bets, and the money. (R. 1295, 1349, 1356.) He received a salary of $10 a day before he entered the army but not after he returned. (R. 1355.) He stated that he believed 1946 was a losing year. (R. 1562.) It was impossible to tell from the records how much of an "equity" Kyne and Lando had built up, since the records contained no capital accounts and consisted of only one figure a day, win or lose, and most of those for 1945 had been destroyed on petitioner's orders.[18] (R. 1349–1352, 1946, 1964–1966.) Kyne could not recall whether petitioner's original investment had been returned to him out of earnings. (R. 1567.) The size of the business appears from the fact that it issued cashier's

[18] The records did contain notations of certain amounts, but Kyne could not recall whether they represented money owing to or by the partnership. (R. 1366.)

checks in the amount of $428,000 to other bookmakers during 1943.[19] (R. 1416–1424, 1954.)

The original partners at *110 Eddy Street,* which petitioner took over to protect $4,000 owed him by Bent, were Bent, Pratt, petitioner, and Kyne, the two latter holding a joint one-third interest. (R. 1383, 1389.) After the death of Bent and the purchase of Pratt's interest by petitioner, the equal partners were petitioner, Kyne, Cavani and Turner. (R. 1385.) Kyne testified that he had never received any profits from the business, but said that he had reported his proportionate share of the income each year and had received money from the bookkeeper to pay the taxes due on such share.[20] (R. 1386–1392, 1515–1516; cf. 3531–3535.) He was unable to say what his "equity" in the business was. (R. 2236.) During his period in the army Kyne had made affidavit that he and petitioner owned the equipment and that Cavani and Turner "do not own any interest in the business, except a working interest, that is, they work for us for a salary and a cut of the profits." (R. 3588; Ex. 153.) This distinction between partners he sought to explain away at the trial. (R. 2235–2239, 2271–2293.) Cavani received a weekly salary. The only share of profits he received was

[19] Kyne did state that the majority of these resulted from layoff bets on which the partnership received no profit. (R. 1581.)

[20] In 1943 in fact he reported two-thirds of the income as his own, although it actually belonged to petitioner. (R. 1386–1390.)

$1,500 in 1946. The books showed that he had received money each year to pay income taxes on his proportionate share of the net income and he admitted that the bookkeeper had brought him such checks to sign. He had no idea what his "equity" was at the end of 1946. (R. 2073, 2079–2081, 2090–2095, 2100–2104, 2106–2107.) Petitioner, it appeared, had withdrawn $9,000 at one time and $3,000 at another. (R. 2077–2078, 2110.) When Bent died in 1943 his sister was paid $3,500 which Kyne obtained from Box 48. (R. 1569–1570.) Pratt, the only one who had contributed capital aside from petitioner, was bought out by petitioner early in 1944 for $6,800. (*Supra*, p. 12.)

The purported partners in the *Day-Night Cigar and Liquor Store* were petitioner, Kyne and Lando. Lando made no investment, was informed by petitioner that he had a one-third interest, took no part in the operation, received no profits, and apparently did not know how much of an "equity" he had acquired. He was credited in the returns with a share of the profits and received money to pay his income taxes on that share, but said that he understood the profits were to be left in the business to build up the inventory. (R. 1312–1315, 1338–1342.) Kyne's wife received $10 a day from the business while he was in the service and he received $12.50 a day after he returned. He received no other share of the profits. Yet for 1943 he reported a net profit of

about $8,500 from the business on his individual income tax return. This was the total profit of the business and he paid the tax on all of it. Slater and Maundrell kept the books and took inventory. Kyne also stated that he understood that the profits were being put into increased inventory and that petitioner was to be repaid his investment before profits were to be drawn by himself and Lando. (R. 1451–1473, 1520–1523, 1540–1541.)

The original purported partners in the *Menlo Club* were petitioner, 40%; Kyne, 15%; Ditto, Nelson, Maundrell and Fricker, 10% apiece; and Turner, 5%.[21] After 1945 Ditto and Fricker dropped out. Petitioner's share was increased to 55% and Nelson's, to 15%. (R. 1703–1705.) Kyne was in the army when the business was acquired in April 1945, and he was not advised of his interest by petitioner until he returned in June 1946. He drew neither salary nor profits, he did not know whether petitioner's original investment had been returned, and he did not know the amount of his own "equity" at the end of 1946. (R. 1400, 1403–1404, 1509–1513.) Maundrell received a salary but no profits during 1945 and 1946. His share was recorded in his capital account on the books and he drew a sufficient amount to pay income taxes on his annual

[21] Ditto, Nelson, Fricker and Turner were not available as witnesses at the trial. (R. 2106, 2919–2921.) It may also be noted that Slater, Nealis and Kopstick were dead. (R. 2004, 2175.)

share,[22] but it was not until 1948, shortly before he left the club, that his account reveals withdrawals of accrued profits for other than tax purposes. At the time of his departure he drew out $12,000, leaving him a balance on the books of about $1,750.[23] (R. 1705–1708, 1806–1810.) There was a wide discrepancy between the partners' capital accounts as they appeared in the books and as they appeared in the partnership return. (R. 1856–1857.) The club books did not reveal that Ditto and Fricker received any of their accumulated profits when they left after 1945 or how these profits were disposed of.[24] (R. 1708–1709, 1858–1860, 1883–1886.) In November 1946 Kyne withdrew $65,000 from the *Menlo Club* account at petitioner's request and turned it over to petitioner in thousand dollar bills. (R. 1414–1415.)

The *186 Club* began as an ostensible partnership between petitioner, Kyne, Lando, Busterna, Casselini, Nealis and Kopstick. (R. 1303–1304,

[22] The purported shares of all the partners were similarly recorded in the *Menlo Club* books, and all of them drew on their accounts to pay taxes. (R. 1808, 1833.) Nelson's account revealed some withdrawals of cash, not for taxes, beginning with March 1947. (R. 1828–1836.)

[23] This was, of course, long after the revenue agents had begun the investigation.

[24] In answer to a question by defense counsel Maundrell stated that he had seen an acknowledgment by Ditto that he had received $14,000 on leaving. It then appeared that Maundrell had never heard of this until defense counsel showed him the acknowledgment the previous evening. (R. 1897, 1901.)

1426.) Later, upon orders of Deputy Collector Mooser, who had investigated the business,[25] a corporate form was assumed and Busterna, Casselini, Kyne and Lando became officers. (R. 1303, 1331–1332, 1553–1555, 2011–2015.) There were no officers' meetings and no shares of stock. (R. 1305, 1981, 2034.) Kyne received neither salary nor profits, although the corporate return apparently stated that he was a salaried officer. (R. 1431.) The same was true of Casselini and Lando, although they were given money to pay income taxes on the salary they were supposed to get. (R. 1305, 1334, 1431, 2030, 2034, 2044–2048.) Neither received anything upon withdrawal from the business in 1945. (R. 1337–1338, 1428–1429, 2031.) Busterna, the president, was not even aware that there was a corporation and had little understanding of the nature of the business. (R. 1976–1982, 2023–2024.) He received $25 a day and $5,000 each Christmas, but he was uncertain what this latter amount represented. (R. 1976, 1982–1983, 2011, 2015–2016.) According to the corporate returns he received a salary of $6,000 in one year and $4,500 in the other. (R. 3556, 3575.) Nealis and Kopstick, the only ones who had originally contributed capital other than petitioner, were repaid by

[25] Mooser impressed upon Kyne that the records of the club, which, like the *B-R Smoke Shoppe* records, contained but one figure each day representing a gain or loss, were altogether inadequate. (R. 1436, 1568, 2378–2379, 2392–2393.)

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early 1944 as promptly as the money came in. (R. 1427–1428, 1518.)

The partners in the *Transit Smoke Shop* were Partee, Kyne and petitioner. This business was acquired in November 1946 after the investigation of petitioner's returns had begun, and there appears to have been a distribution of profits to partners. However, Kyne put the $1,000 he received into Box 48 and may have used it for one of the other enterprises. (R. 1191–1192, 1477–1478.)

5. *Starting point of net worth computation.*— As has been noted (*supra,* p. 30), the second challenge to the sufficiency of the Government's computation of increases in petitioner's net worth was that the Government had failed to establish that all of his assets as of December 31, 1943, had been taken into account.

The Government conducted a widespread and exhaustive investigation to determine petitioner's assets as of that date. (R. 2458–2465, 2534–2547, 2558–2559, 2566–2567, 2801–2802.) As a result, the items in the Government's schedule of assets and liabilities were essentially the same as those submitted by petitioner (compare Ex. 183 with Ex. M–1; R. 3612–3613, 3626–3628), and the dispute as to the accuracy of the Government's starting point net worth narrowed to two issues: (1) whether the San Francisco businesses acquired prior to December 31, 1943, were bona fide partnerships; and (2) whether the amount of cash

in Box 48 was insufficient to make any substantial difference in the net worth starting point. As to the first issue, the Government, on the strength of the evidence set out above, credited petitioner with all the assets of the San Francisco businesses acquired prior to December 31, 1943. As to the second, the Government reasoned that the amount of cash in Box 48 at the starting point was too small to make any difference and simply marked this item in the computation with a question mark.[26] The evidence to support this reasoning is as follows:

Prior to 1944 petitioner reported taxable income only for the years 1934, 1942 and 1943. (R. 567–568.) In 1937 he was "broke" and unable to pay a tax and delinquent penalty in the amount of $178.10 still owing for the year 1934. (R. 2849–2852.) During all the period he managed *Cal-Neva, Inc.*, beginning in 1930, he received no salary and only one dividend which he promptly gambled away. (R. 1912, 2850.) An $1,800 judgment obtained against him in 1938 remained un-

[26] Box 39813 (*supra*, p. 18) was also in use on December 31, 1943, but it was used only for overnight storage of the *B–R Smoke Shoppe* bank roll, and this had already been included in the computation among the assets of that business. (R. 1369, 1373–1374, 1939–1942, 3601; cf. 1357–1360, 1537.) Box 730 (*supra*, p. 18) was not acquired until later. (R. 1369–1370, 1536.) The safe at *110 Eddy Street* (*supra*, p. 17) was used only to keep the previous day's receipts overnight. (R. 1536, 2076, 2096–2097.) The safe in the main office at 50–52 Mason Street was not acquired until 1944. (R. 1709–1711, 2515, 3607–3608.)

paid until September 1945. (R. 1282–1285.) He was still in debt to his brother at the end of 1943, although the brother had written off one amount as a bad debt at the end of 1942.[27] (R. 2992, 3395.) And he owed *Cal-Neva, Inc.*, $23,152.77 as of December 31, 1943. (R. 2507.)

In December 1941, however, he began to invest cash in the acquisition of business interests. These cash payments, at first comparatively small, grew larger and larger, as we have seen (*supra*, pp. 10–14), during the period up to the end of 1946. The *B-R Smoke Shoppe* was acquired and put into operation in December 1941 for $10,000. In July or August 1942 petitioner took over the tavern at *110 Eddy Street*, spent a considerable sum in improvements, and obtained $3,400 from Pratt to meet part of the cost.[28] On the death of Clarence Bent, early in 1943, the claim of his estate was settled by payment of $3,500 taken from Box 48. (R. 1569–1570.) In March 1943 petitioner acquired the *186 Club* and the *Day-Night Cigar and Liquor Store* with $6,000 of his own and $16,000 obtained from Nealis and Kopstick.

[27] When Mooney, in preparing petitioner's 1942 income tax return, asked what his income was petitioner said he had made $10,915 on the Kentucky Derby. This was the total amount of net taxable income reported for 1942. (R. 879–880.)

[28] The sum expended by petitioner appears to have been about $24,000. A trustee account in that amount in the name of Kyne is recognized as belonging to petitioner. (R. 3636–3637.) Some of this was drawn from *Cal-Neva, Inc.*, by petitioner. (R. 2508.)

In May 1943 he purchased the El Cerrito property in which the *21 Club* and the *San Diego Social Club* were located for $25,000. Nealis and Kopstick were repaid their $16,000 in installments as fast as the money came in; the payments were made from Box 48 and were completed early in 1944. Pratt, who was becoming restive when not informed of progress at *110 Eddy Street,* was given $2,000 in the latter part of 1943 and was finally bought out for an additional $4,800 in March 1944.

Box 48 was used as a depository for the funds of the San Francisco enterprises and for other funds belonging to petitioner (*supra,* p. 17). There is no direct evidence as to the amount it contained on December 31, 1943. Kyne testified that the amount varied, and answered "Yes" when asked by defense counsel if it was sometimes considerable and sometimes less. (R. 1536.) He stated that he had kept a daily record but that he had given it to Slater and had not seen it since. (R. 1559–1560.) He testified that approximately $17,700 was placed in the box on December 3, 1943. However, this was an abnormal transaction, representing the return of a portion of a deposit petitioner had made on the purchase of two carloads of whiskey. (R. 859–860, 875, 1482–1490.) Furthermore, Kyne testified that this money was to be used as needed in the San Francisco businesses, that money from the box was used to purchase cashier's checks to pay lay-off bets of the *B-R Smoke Shoppe,* and that during that same month

of December checks in excess of $20,000 were purchased. (R. 1416–1423, 1484; Ex. 116.)

During the investigation petitioner and his associates refused to give any indication of the amount of cash in Box 48, although the revenue agents repeatedly pointed out to Kyne, Slater and Maundrell that the records of the San Francisco businesses were inadequate and asked for information as to the contents of safe deposit boxes and safes. (R. 2154, 2177, 2199, 2463, 2563–2566.) The agents were never able to obtain access to, or information concerning, the contents of any of the safes or boxes. (R. 2547, 2558, 2566, 2797–2798.) With specific reference to Box 48, Kyne refused the agents access and told them that he could give no information as to the amount of cash it contained at any particular date and that, contrary to his later statement at the trial, there was no record of its contents. (R. 2566–2567.) Kyne arranged an interview between petitioner and the agents on April 8, 1948, after the investigation had been in progress for almost two years, but petitioner, on advice of his attorney, refused to give any information on the ground that the agents would not tell him what charges they intended to bring or in what particulars he had failed to report taxable income.[29] (R. 2558–2572, 3072.) In 1949 the

[29] A written statement to this effect, handed to the agents at the conclusion of the abortive interview, had been dictated by petitioner's attorney and typed before the agents arrived. (R. 3068, 3619; Ex. G–1.)

Bureau of the Internal Revenue sent petitioner a notice (commonly known as a 90-day letter) stating that the Commissioner had determined that his income tax returns for the years 1944, 1945 and 1946 were deficient. The notice specified the amount of unreported income for each year, and it specified that this income had been received from the same enterprises which we have enumerated above. (R. 30, 32.) In February 1950 petitioner was officially notified that criminal proceedings were being considered. (R. 3210.) There were numerous conferences between petitioner's attorneys and accountants on the one hand and representatives of the Government on the other, and on May 25, 1950, almost a year prior to the indictment, the Government offered to submit its net worth computation ~~for computation~~ for comparison if petitioner's representatives would prepare a similar computation on his behalf. This offer was never accepted. (R. 36–39.) At the trial petitioner offered no evidence as to the amount of cash in Box 48 at the starting point, or at any other time, and contented himself with arguing that the Government's net worth computation was fatally defective because it had failed to establish this item accurately. (R. 2942–2984.)

6. *Results of net worth computation.*—In the Government's computation the amount of federal income taxes paid by petitioner was added to the annual increase in net worth in order to

determine his taxable net income. Although the evidence clearly indicated that his nondeductible living expenses were considerable, this item was simply marked with a question mark in the computation of his net worth at the end of the period, since he had refused information on the subject. (R. 2560–2562, 2566; cf. 2923–2939.) For 1944 the computation showed a net income of $50,747.91, of which $31,747.91 was unreported. For 1945, the net income was $71,065.40, of which $11,747.04 was unreported. For 1946, the year on which the jury failed to agree, the net income was $254,285.42, of which $231,795.84 was unreported. (R. 88, 3612–3613; Ex. 183.)

SUMMARY OF ARGUMENT

I

Petitioner was convicted of attempting to evade income taxes by failure to report large portions of his taxable income. The Government presented circumstantial proof of unreported income by showing large increases in petitioner's net worth in excess of his reported taxable income, and by showing that the only reasonable source of this excess was current taxable income.

The use of the net worth method of proof was justified by the fact—established by the jury's verdict—that petitioner's books and records were completely inadequate. There were no available records of petitioner's personal finances. Some of the business records were missing. Others had

only one entry a day, showing the amount won or lost. Important items were not entered on the books and no proper trial balance could be drawn. Petitioner filed his returns on the cash basis. But his books failed to reveal all his income. The Government accordingly determined the amount of his taxable income by a net worth computation on the cash basis.

In any event, Section 41 of the Internal Revenue Code does not require that the Government, before introducing net worth proof of income in a criminal case, must first make a showing of the inadequacy of the taxpayer's method of accounting or obtain a prior determination of such inadequacy by the Commissioner. A net worth computation is not an alternative or substitute method of accounting, but a reconstruction of income. It affords circumstantial proof of income; and Section 41 imposes no restriction on the Government's choice of its method of proof in criminal cases.

II

The evidence was sufficient to warrant leaving the case to the jury, and to support the verdict of guilt. The Government established the starting point of its net worth computation by evidence from which a reasonable man could have concluded beyond a reasonable doubt that the increases in net worth reflected unreported taxable income.

(a) The Government showed, by direct and circumstantial evidence, that there could have been no substantial amount of cash in petitioner's safe deposit box at the starting point, principally because petitioner was spending cash as rapidly as he acquired it at that time.

(b) The Government did not use a hybrid method of accounting in its net worth computation, but adhered strictly to the cash method which had been used by petitioner in his returns. The evidence indicates that the "markers" representing unpaid bets due the *B-R Smoke Shoppe* were the equivalent of advances from cash on hand, and were treated as cash items by petitioner and his associates. Furthermore, there was evidence to support the verdict on the 1945 counts even if the $15,000 in markers were excluded from consideration.

(c) The evidence clearly established that the so-called partnerships were shams, used by petitioner for tax evasion purposes. The question was properly submitted to the jury, under instructions which made it clear that petitioner could not be convicted unless the jury found that he wilfully filed false and fraudulent returns with the intent to evade income tax. Since the evidence supports the conclusion, necessarily established by the verdict, that the partnerships were not real but were actually sole proprietorships of petitioner, and that petitioner acted with fraudulent intent to defeat and evade the tax, there

is no basis for disturbing the conviction in this regard.

III

The trial court did not err in denying petitioner's requests for inspection or production of documents under Rules 16 and 17 of the Federal Rules of Criminal Procedure. Petitioner had ample opportunity before the indictment and trial to examine the records in question and to prepare his defense. Petitioner's motions were not made until shortly before the trial was scheduled to begin, and if granted would have required a further lengthy continuance of the trial. Since petitioner failed to explain his delay in making the motions, the trial court was justified in its action. In any event, there is no showing of possible prejudice. Records specifically requested by the defense during the trial were promptly made available to it. In the circumstances of this case, the trial court clearly acted within its discretion in denying petitioner's motions.

IV

In his motion for a new trial petitioner alleged that in the course of the trial an improper conversation occurred between one of the jurors and an unidentified third person. Petitioner renews in this Court his request, denied by the district court, for a hearing to inquire into the facts concerning the alleged incident to ascertain whether he was prejudiced thereby. The

Government agrees that, where it is shown on a motion for a new trial that a potentially prejudicial outside contact with a juror has occurred, the appropriate procedure is to probe the matter by a hearing on the record. Accordingly, the Government does not oppose remand of the case to the district court for that purpose.

ARGUMENT

I

THE USE OF THE "NET WORTH" METHOD OF PROOF TO ESTABLISH UNREPORTED INCOME WAS PROPER

The indictment charged that petitioner had attempted to evade and defeat his income taxes by failure to report large portions of his net taxable income. As the petition for certiorari pointed out (p. 18), there are several methods by which the Government may proceed to prove the truth of such an allegation in a criminal tax case. The most obvious is by direct evidence that the defendant received specific items of income which he did not report in his returns. The same result may, however, be reached by circumstantial evidence. Thus, unreported income may be shown by unexplained increases in the defendant's net worth, and expenditures in excess of reported income. Such circumstantial evidence, showing that the defendant's increase in assets and non-deductible expenditures during the year are substantially in excess of his reported income, justifies the conclusion that the

excess represents current taxable income, if the Government has established that it could not have come from nontaxable income or funds accumulated prior to the taxable period. The Government is not required to prove the exact amount of unreported income in a criminal tax evasion case. *United States* v. *Johnson,* 319 U. S. 503, 517.

As the Court of Appeals stated (R. 3762), the Government's case against petitioner was "based upon the net worth method, the underlying theory of which is that where a person's net worth at the end of a particular year is greater than his net worth at the beginning of that year, and such increment is not attributable to gifts, devises, loans, or other non-income sources, an inference may be drawn that the increase in net worth represents income to the taxpayer." The validity of this method of proof, which is essentially indistinguishable from the so-called "expenditures" method of proof sustained by this Court in *United States* v. *Johnson, supra,* has long been recognized in the lower federal courts. *Banks* v. *United States,* 204 F. 2d 666 (C. A. 8), certiorari denied, 346 U. S. 857; *Schuermann* v. *United States,* 174 F. 2d 397 (C. A. 8), certiorari denied, 338 U. S. 831; *Bell* v. *United States,* 185 F. 2d 302 (C. A. 4), certiorari denied, 340 U. S. 930; *Dawley* v. *United States,* 186 F. 2d 978 (C. A. 4); *United States* v. *Potson,* 171 F. 2d 495 (C. A. 7); *United States* v. *Chapman,* 168 F. 2d 997 (C. A.

7), certiorari denied, 335 U. S. 853; *Gendelman* v. *United States,* 191 F. 2d 993 (C. A. 9), certiorari denied, 342 U. S. 909; *Clawson* v. *United States,* 198 F. 2d 792 (C. A. 9); *Barrow* v. *United States,* 171 F. 2d 286 (C. A. 5); *Gariepy* v. *United States,* 189 F. 2d 459 (C. A. 6); *Kirsch* v. *United States,* 174 F. 2d 595 (C. A. 8); *Leeby* v. *United States,* 192 F. 2d 331 (C. A. 8); *Pollock* v. *United States,* 202 F. 2d 281 (C. A. 5); *United States* v. *Yeoman-Henderson, Inc.,* 193 F. 2d 867 (C. A. 7); *Brodella* v. *United States,* 184 F. 2d 823 (C. A. 6).

In this case the Government undertook to prove that petitioner had failed to report substantial portions of his taxable income for 1944, 1945, and 1946, by showing annual increases in his net worth, the only reasonable source of which was current taxable income. Petitioner urges here, as he unsuccessfully did in both courts below (*supra,* p. 7, fn. 3), that such a method of proof should not have been allowed in this case. The argument, repeated in this Court (Br. 20–26), is that Section 41 of the Internal Revenue Code (*supra,* p. 3) permits the Government to prove unreported taxable income by showing increases in net worth only in a case where the "method of accounting" employed by the taxpayer does not clearly reflect his income; that the evidence in this case established clearly inadequate books only with respect to the *B-R Smoke Shoppe,* the errors in the books of the other enterprises amounting to no more than normal accounting errors; and

that the use of the net worth method of proof was, therefore, improper. Petitioner makes two further arguments to this Court which were not made or considered in the courts below. He argues that, before the net worth method of proof of unreported income can be employed by the Government in a criminal tax case, the Commissioner of Internal Revenue must make a preliminary determination that the method of accounting employed by the defendant is inadequate. And he argues that there can be no prosecution for wilful attempted evasion of income taxes under Section 145 (b) (*supra,* p. 4) of the Internal Revenue Code, until the Commissioner has first determined officially how much taxes the defendant owes. We submit that none of these arguments has merit.

(a) Assuming for the moment that Section 41 has application to a criminal prosecution for tax evasion—and we shall argue, pp. 48–54, *infra,* that it has not—, the jury in this case was instructed that the Government's use of the net worth method of proof was authorized only "if the books of the taxpayer are found to be inadequate" (R. 136–137),[30] and, as the Court of Appeals expressly held (R. 3762), the evidence is

[30] While we believe this instruction was erroneous, see pp. 48–54, *infra*, petitioner can hardly complain that such an instruction was given, since its only effect was to increase the burden of proof imposed on the prosecution in order to convince the jury of petitioner's guilt.

sufficient to sustain a finding that petitioner's records were inadequate. The testimony here presents overwhelming evidence of the utter inadequacy of petitioner's "cash" method of accounting, since there were no books and records upon which an adequate cash accounting could be made.

In the first place, there were no available records of petitioner's personal finances.[31] His right hand man, Kyne, and his bookkeepers and accountants, Maundrell, Slater and Ayton, turned over to the agents numerous business records, but they denied knowledge of petitioner's personal finances and petitioner himself refused all requests for information. (R. 2559, 2563–2566, 2572). His personal funds appear to have been commingled in Box 48 with cash belonging to the various businesses, but Kyne had no recollection of the amounts in the box and there was no available record. (*Supra,* pp. 18, 33, 34.) The absence of personal records,[32] together with the

[31] With the exception of two small bank accounts and such personal purchases and expenditures as the agents were able to unearth from the records of third parties.

[32] Petitioner was required to keep such records as would enable the Commissioner to determine the correct amount of his taxable income. Section 54 (a) (26 U. S. C., 1946 ed., Sec. 54) of the Internal Revenue Code provides:

> Every person * * * shall keep such records * * * as the Commissioner * * * may from time to time prescribe.

Treasury Regulations 111, Sec. 29.54–1, under the Internal Revenue Code, in effect during the years involved in this case, provided:

indiscriminate and unrecorded use of the funds in Box 48 as needed in any of the San Francisco businesses, would alone have been sufficient to justify the use of the net worth computation.

Nor were the books of the various enterprises such as would have enabled the Commissioner to determine the taxable income they earned. Weaver, the Government's expert accountant, testified that in his opinion the books were entirely inadequate, and he had expressed this criticism to petitioner's associates during the investigation. (R. 2564, 2715, 2766–2767.) The inadequacy of the *B-R Smoke Shoppe* books was admitted in the petition for certiorari (p. 22). The only records of this enterprise were a series of books which contained one single figure for each day representing the amount won or lost that day, and this was a net figure from which all expenses had already been deducted. Not even this was available for the eighteen month period of Kyne's absence in the army, since petitioner had ordered the destruction of all records kept during that time. (R. 1349–1352, 1358, 1946, 1964–1967). The records of the *186 Club* were examined by a deputy collector during 1944. The club op-

Every person * * * shall, for the purpose of enabling the Commissioner to determine the correct amount of income subject to the tax, keep such permanent books of account or records * * * as are sufficient to establish the amount of the gross income and the deductions, credits, and other matters required to be shown in any return * * *.

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erated 24 hours a day with three eight-hour shifts, and the only records consisted of poker sheets made out at the end of each shift, and a book in which a single figure, representing either win or loss, was entered for each shift. The deputy collector discovered that the entries in the book did not correspond with the figures on the sheets and he directed Kyne, orally and in writing, to keep adequate books of account. (R. 2372–2393.) At the trial, however, the only records available to the Government were some of the daily poker sheets.[33] (R. 1436–1437, 1640–1650, 2421–2422.)

There were no 1945 books whatsoever for the *Menlo Club*. (R. 1778–1780, 2795–2796.) The 1946 books consisted of a record of receipts and disbursements and a few ledger accounts, and no proper trial balance could be prepared from them. (R. 2518–2519.) Money was put into the restaurant account standing in the name of petitioner and Maundrell and checks were drawn upon it for particular purposes, such as the construction of the general offices at 50 Mason Street, but there

[33] No figure was included in the net worth computation for the *186 Club* (R. 3612) since petitioner had made no original investment and since it was operated as a corporation. However, Busterna, the "president", testified that there was a profit every year, and although on cross-examination by defense counsel he attempted to modify this statement, the jury would clearly have been justified in inferring that the club was a source of considerable income which went into Box 48. (R. 1430–1431, 1986, 1999, 2011.)

was nothing in the books to indicate where this cash came from or whether it represented a credit of the club. (R. 1743–1753.) A bank account opened in October 1946 did not appear on the books, and they contained no record of two checks drawn by Kyne, both previously mentioned (*supra,* pp. 14, 28), in the amounts of $65,000 and $16,000. (R. 2794–2795.) There was no record of cash and the bank accounts could not be reconciled with cash receipts shown on the poker sheets from the gambling room. (R. 2797.) There was no record of the supposed payment of $14,000 to Ditto at the time he withdrew from the business. (R. 2799–2800; *supra,* p. 28, fn. 24.) The general ledger at *110 Eddy Street* was posted only up to October 31, 1945; the inventory account was missing until sometime in 1945; no trial balance could be drawn from the books. (R. 2333.) The revenue agent who examined the El Cerrito businesses never saw any books for the *San Diego Social Club* (R. 1275), and the books of all three El Cerrito businesses were turned over to petitioner by Pechart two weeks after the filing of the indictment in this case and were not available at the trial. (R. 1102–1104, 1137–1138.)

But petitioner urges (Br. 22) that the Government should not be heard to say that the books of any of the enterprises were inadequate because it still retained some of these books at the time of trial and did not introduce them in evidence. Petitioner, of course, knew which of his records

were essential to the presentation of a correct picture of his income, and there is not a shred of evidence to indicate that any record of any value was withheld from him. Whenever during the trial the defense requested the production of specific documents in the Government's possession, they were promptly produced. (R. 813–814, 1794, 2008, 2020, 3182, 3470–3473.)

(b) We have assumed up to this point that Section 41 of the Internal Revenue Code requires the Government to make some independent showing of the inadequacy of a taxpayer's books before it may be permitted to use the net worth method in a criminal case. That section provides:

> The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

The Court of Appeals stated in its opinion (R. 3762):

> The net worth method of computing income may be used only where a taxpayer does not keep books or such books are inadequate in that they do not clearly reflect income. See 26 U. S. C. A. Sec. 41.

While it is unnecessary for this Court to reach the question—since, as has been shown, petitioner's books and method of accounting *were* inadequate, as was found in both courts below—we believe the Court of Appeals erred in regarding Section 41 as imposing a limitation on use of the net worth method of proof in a criminal tax evasion presentation. The net worth method is not a method of accounting; its purpose in a criminal case is not to recompute the taxpayer's actual income, in order to determine his exact civil liability in dollars and cents. It is a method of proving, by relevant circumstantial evidence having probative value, that there is a substantial understatement in the taxpayer's reported income and tax.[34] Even though a taxpayer's method of accounting appears, on the face of his books, to reflect clearly his income, the Government is not precluded from showing that some items of income

[34] "While the government had the burden of proof, it was not required to make a perfect case or to prove the defendant guilty to a mathematical certainty. The government did not have to establish the exact amount of unreported income of the defendant. *United States v. Johnson*, 319 U. S. 503, 517, 63 S. Ct. 1233, 87 L. Ed. 1546." *Schuermann* v. *United States*, 174 F. 2d 397, 399 (C. A. 8), certiorari denied, 338 U. S. 831.

have not been reported. The net worth method is not, as petitioner assumes, a substitute for the cash, accrual, or installment method of accounting. It is simply a means for proving that a taxpayer, whatever his method of keeping books, has failed to show items of taxable income.

Section 41 deals with whether a taxpayer, in view of the character of his business and the nature of his activities and transactions, should be on one or the other basis of accounting or on a calendar or fiscal year basis. Treasury Regulations 118, Sec. 39.41–2. That is a problem of accounting, the kind of problem involved in cases like *Lucas* v. *American Code Co.,* 280 U. S. 45; *Dixie Pine Co.* v. *Commissioner,* 320 U. S. 516, 518–519; and *Security Mills Co.* v. *Commissioner,* 321 U. S. 281. But where a taxpayer either keeps no books, or books which are incomplete, inaccurate, or otherwise unsatisfactory, the Commissioner is authorized to use such means for reconstructing his income (including the net worth method) as may establish the correct amount. Treasury Regulations 118, Sec. 39.41–1; *Halle* v. *Commissioner,* 175 F. 2d 500, 502–503 (C. A. 2); *Harris* v. *Commissioner,* 174 F. 2d 70, 72–73 (C. A. 4); *Cohen* v. *Commissioner,* 176 F. 2d 394, 397 (C. A. 10); *Richards* v. *Commissioner,* 111 F. 2d 374, 375 (C. A. 5); *Bishoff* v. *Commissioner,* 27 F. 2d 91, 93 (C. A. 3). The computation of income by examining increases in net worth involves no change of method of

accounting from that employed by taxpayer. As has been noted (*supra,* p. 7), petitioner was on the cash basis, and the net worth computation was made on the same basis. It is not his method or basis of accounting, but the income not accounted for and reported, which forms the basis of this prosecution.

A solidly based net worth computation may provide sufficient evidence in itself that the taxpayer's method of keeping his books does not clearly reflect his income. For if the Government establishes both the totality of the taxpayer's assets at the starting point, and excessive increases in his net worth, by evidence which, if believed, would leave no room for a reasonable doubt, the only reasonable inference must be that his books do not properly reflect all of his transactions. *Doyle* v. *Mitchell Bros. Co.,* 247 U. S. 179, 187; *Del Marcelle* v. *Kuhl,* 80 F. Supp. 616, 618 (E. D. Wis.).

Section 41 cannot be construed, therefore, to require the Government to prove the inadequacy of a defendant's *method* of accounting before it may proceed to prove its case by circumstantial evidence. There is no such rule in criminal law,[35] and neither the language of Section

[35] Truth may be established just as solidly by circumstantial evidence as by direct. In each case the determination depends, not upon the type of the evidence, but by its convincing quality. *United States* v. *Becker,* 62 F. 2d 1007, 1010

41 nor anything that we have been able to find in its legislative history indicates a Congressional intent to make it applicable to criminal cases. It should be noted that the statute refers to computations made by the Commissioner. But the Commissioner is not a party to a criminal case. Civil tax cases are disputes between the taxpayer and the Commissioner, the question is the *exact* amount of tax owed, and the burden of proof rests upon the taxpayer to show that the Commissioner's computation is erroneous. In criminal cases, however, the issue is whether the taxpayer fraudulently evaded *some* of his income taxes, and the burden of proof is on the Government. The Government must prove, by competent evidence and beyond a reasonable doubt, that the defendant has violated Section 145 (b) of the Internal Revenue Code, *supra,* which punishes "any person who willfully attempts in any manner to evade or defeat" his tax liability.

The breadth of this provision has frequently been noted by the Court. *Spies* v. *United States,* 317 U. S. 492, 499; *United States* v. *Johnson,* 319 U. S. 503, 515; *United States* v. *Beacon Brass Co.,* 344 U. S. 43, 45–46. The choice of methods of proof rests with the Government; and Section 41 has reference, not to methods of proof in criminal cases, but to the various recognized basic

(C. A. 2); *McCoy* v. *United States,* 169 F. 2d 776, 784–786 (C. A. 9), certiorari denied, 335 U. S. 898; I and IX *Wigmore, Evidence,* Secs. 25–26, 2497; II Wharton, *Criminal Evidence* (11th ed., 1935), Sec. 926.

"methods of accounting", e. g. cash, accrual, or installment, used in computing civil tax liability. See *Healy* v. *Commissioner,* 345 U. S. 278, 281.[36] Section 41 simply gives the Commissioner authority to change the taxpayer's method of accounting, where it does not clearly reflect the income, from one basis to another. It does not deal with a situation like this, where the taxpayer, even though his method of accounting may be proper, has wilfully concealed items of taxable income. Petitioner's method of accounting is not challenged here; the gist of the offense of which he was convicted is the failure to report income and pay the tax due thereon. The net worth method of proof in a criminal case is thus used to test the verity of the books, and not the adequacy (from an accounting standpoint) of the basis on which they are kept.

Section 41, as petitioner points out (Br. 21), has been held by this Court to refer "to the general bookkeeping system followed by the taxpayer and not to the accuracy or propriety of mere individual items or entries upon the books." *United States* v. *American Can Co.,* 280 U. S. 412, 419; and see *Schram* v. *United States,* 118

[36] See Avakian, *Net Worth Method of Establishing Fraud,* 11 Institute on Federal Taxation 707, 709 (1952):

> Since different methods of basic accounting (such as cash, accrual, or installment) will produce different results, it is essential that the net worth statement reflect the correct method for the particular case (which ordinarily would be the method chosen by the taxpayer).

F. 2d 541, 543–544 (C. A. 6). But a criminal prosecution for tax evasion *is* concerned with an inquiry into the accuracy and proper disclosure of individual items of income, and not with the accounting problem of which method of keeping books—cash or accrual, fiscal or calendar year, etc.—is more appropriate in clearly reflecting the income shown by such books.

This same confusion appears in the two arguments raised for the first time in this Court. Petitioner argues (Br. 20–21, 25) that the Government may not use the net worth method in a criminal case until the Commissioner has made a preliminary determination under Section 41 that the taxpayer's method of accounting is inadequate. No such objection was raised in the trial court or in the Court of Appeals.[37] The first hint of it appears in a doubtful form in the petition for a writ of certiorari.[38] Questions not presented in the petition are not open for consideration in this Court. *Helvering* v. *Taylor,* 293 U. S. 507, 511; *Gunning* v. *Cooley,* 281 U. S. 90, 98. Even if the argument had been properly raised in the lower courts and in this Court, it is based on a misconception of Section 41 and of the relation between the collection of taxes and prose-

[37] One of petitioner's requested instructions left the determination of the issue to the jury. (R. 87.) No objection was made to the instructions given on the issue. (R. 136–137, 142, 3495.)

[38] The question was stated in an alternative and ambiguous manner in the specifications of error. (Pet. 17.)

cution for evasion of taxes, and for the reasons stated above, is without merit.

The second new argument (Br. 23–26) is that no prosecution for wilful attempted evasion of taxes can be brought under Section 145 (b) of the Internal Revenue Code unless the correct amount of the taxes due has first been determined officially by the Commissioner. This was not raised in either of the lower courts or in the petition for the writ. Furthermore, it ignores the fact that our system of income taxation is based largely on self-assessment. *Commissioner* v. *Lane-Wells Co.*, 321 U. S. 219, 223. The Commissioner does not impose taxes, as petitioner implies. The tax is imposed by the statute. For purposes of determining civil liability, the Commissioner determines and assesses the correct amount when the taxpayer files no return or one which is erroneous or fraudulent.[39] Determination and assessment by the Commissioner is, however, not a prerequisite to criminal prosecution. *Guzik* v. *United States*, 54 F. 2d 618, 619 (C. A. 7), certiorari denied, 285 U. S. 545; *United States* v. *Commerford*, 64 F. 2d 28, 30 (C. A. 2), certiorari denied, 289 U. S. 759.

[39] Petitioner argues (Br. 24) that a criminal tax evasion case under Section 145 (b) cannot be brought unless the Collector has prepared a substitute return under Section 3612. However, since 1939, when the practice was formally discontinued by order of the Commissioner, no substitute returns are prepared by Collectors even in civil cases. (Mimeograph No. 4939, dated July 19, 1939.)

II

THE EVIDENCE WAS SUFFICIENT TO WARRANT SUBMISSION OF THE CASE TO THE JURY AND TO SUPPORT THE VERDICT

Petitioner challenges the sufficiency of the evidence principally on the grounds that the Government failed to establish a solid starting point and that the partnerships were sham. He also challenges the validity of the computation as to the year 1945 because the Government treated "markers" for unpaid gambling debts as cash items.

1. The starting point was established

The burden of proof, of course, lay upon the Government to show that petitioner had received taxable income in 1944, 1945, and 1946 which he failed to report. And since the Government chose to sustain this burden by showing increases in net worth which could only have come from current taxable income, the Government had to establish petitioner's net worth at the starting point, December 31, 1943. Without this fixed term the whole computation would necessarily fail.

However, it was unnecessary that petitioner's absolute net worth be shown. Capital assets held throughout the taxable period could have no effect upon the determination of his income. Furthermore, since the Government was not required to prove the exact amount of unreported income (*United States* v. *Johnson, supra*), other assets

held by petitioner at the starting point did not have to be given an exact dollars and cents value in the computation, provided the Government, even though unable to determine their exact value, could show that they were insufficient to account for the unexplained increases in net worth. The burden rested originally upon the Government, and the burden remained upon the Government, to establish a fixed starting point. But what this means is that the Government had to prove that petitioner did not have sufficient assets at the starting point, plus his reported income for the years involved, to account for the increases in his net worth.[40] The theory of such net worth computations was carefully and clearly explained by the Government's expert, Weaver (R. 2554–2558, 2591–2594, 2611–2612, 2805, 2820–2825; cf. 3270–3271, 3291–3293), and the essential elements were repeated in the court's charge to the jury (R. 131–133, 136–138, 155).

Petitioner contends (Br. 17, 26–31) that the Court of Appeals missed the vital significance of the starting point and shifted the burden of proof to the defense by holding that the Government had established a *prima facie* case despite the fact that it could not determine exactly the amount of cash in safe deposit Box 48. He appears to argue both that the Court of Appeals

[40] Petitioner does not claim that the increases were attributable to nontaxable receipts such as gifts, bequests, or loans. The investigation on this point was exhaustive. (R. 2458–2465, 2534–2547, 2558–2559, 2800–2802.)

applied an improper test of the sufficiency of the evidence, and that the evidence was insufficient even if the proper test had been applied.

The pertinent passages of the opinion of the Court of Appeals (R. 3762–3767) clearly indicate, however, that that court understood the significance of the starting point and did not apply an improper test of the sufficiency of the evidence. After briefly outlining the theory of the net worth computation in income tax cases (R. 3762) and noting petitioner's attack on the accuracy of the starting point, the court said (R. 3763):

> It was necessary for the Government to establish appellant's net worth at the beginning of the period during which the alleged evasion occurred in order to compare his increment in net worth with the income actually reported by appellant on his and his wife's tax returns.

The court pointed out that the test of the sufficiency of the Government's evidence was whether reasonable minds, regarding that evidence in the light most favorable to the Government, could conclude beyond a reasonable doubt that petitioner had wilfully failed to report substantial portions of his taxable income.[41] (R. 3763–3764,

[41] For the test to be applied in determining the sufficiency of the evidence, see *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Glasser* v. *United States*, 315 U. S. 60, 80; *Gorin* v. *United States*, 312 U. S. 19, 32; *Pierce* v. *United States*, 252 U. S. 239, 251–252; *Stilson* v. *United States*, 250 U. S. 583, 588–589; *Curley* v. *United States*, 160 F. 2d 229, 232–233 (C. A. D. C.), certiorari denied, 331 U. S. 837; *Gen-*

3766–3767.) Applying this test to the starting point of the Government's computation the court pointed out that, while petitioner contended that there was a *possibility* that Box 48 contained a substantial amount of cash on December 31, 1943, there was no evidence in the record of such substantial cash funds, and that there was, in fact, evidence which "tended to show that [he] did not have substantial cash at the beginning of 1944." (R. 3765.) It is clear that the court held that the burden of proof is on the Government to establish a *prima facie* case, and that when the net worth method is used in an income tax case the Government must establish a fixed starting point, but that possible "assets" which are shown to be either nonexistent or too insubstantial in amount to affect the computation may be disregarded.

The question remains whether the evidence to establish the starting point in this case actually was sufficient under the test applied by the Court of Appeals—i. e., whether, as petitioner contends, the Government's evidence was so inherently weak and unreliable that the case should not have been permitted to go to the jury. Since the only item about which there can be any dispute is the amount of cash in Box 48,[42] the ultimate question is whether

delman v. *United States*, 191 F. 2d 993, 995 (C. A. 9), certiorari denied, 342 U. S. 909; *Stoppelli* v. *United States*, 183 F. 2d 391 (C. A. 9), certiorari denied, 340 U. S. 864.

[42] As to petitioner's intimation (Br. 6, 31) that there could have been substantial sums in safes or other safety deposit boxes, see *supra*, p. 31, fn. 26.

the jury could reasonably have concluded that the amount in the box on December 31, 1943, was insufficient to make any substantial difference in the results of the Government's computation. That computation showed an unexplained increase in petitioner's net worth totaling almost $33,000 for the first of the three years involved alone.[43] It would, therefore, require a considerable sum to deprive the Government's case of substantiality. We have set forth in the Statement (*supra*, pp. 30–35) the evidence upon which reasonable jurors could conclude that the cash in the box at the end of 1943 was only an inconsiderable fraction of $33,000. That evidence falls into two categories: (a) direct evidence of the cash in the box; (b) evidence that petitioner did not have enough cash to satisfy his needs at the close of 1943.

(a) The direct evidence was slight. Kyne testified that the amount in the box was sometimes considerable and sometimes less. He also testified that he put $17,000 in on December 3, 1943, but this was offset by cashier's checks in the amount of $20,000 purchased with funds from the box during the same month.

(b) There was considerable and cogent evidence to show that petitioner did not have, at that time, enough cash to meet his requirements. Unable to pay $178.10 in delinquent federal income taxes in 1937, petitioner did not begin to file returns

[43] The unexplained increases for the three years involved totaled almost $275,000.

showing taxable income until 1942. Yet, beginning with the purchase of the *B-R Smoke Shoppe* in December 1941, he rapidly poured cash into new acquisitions. The comparatively small amounts of income reported in 1942 and 1943 were obviously disposed of in this manner, and petitioner had to obtain money from other sources to make the purchases he desired. During 1943 he obtained $16,000 from Nealis and Kopstick to acquire the *186 Club,* and he repaid them in installments as fast as the money came in, the payments being completed early in 1944. He obtained $3,400 from Arthur Pratt to help finance improvements at *110 Eddy Street,* and soon bought him out for $6,800, part of which was paid late in 1943 and the remainder in March 1944. He bought a $19,000 home in August 1942, borrowing $5,000 from a bank to complete the purchase. (R. 699–700, 713–720, 3613.) He still owed $4,000 on this loan at the end of 1943; he was still in debt to his brother, although one loan had previously been charged off as a bad debt; he still had not paid the $1,800 Monahan judgment dating back to 1938; and his account at *Cal-Neva, Inc.,* showed a debit of $23,152.77. Petitioner was investing cash as rapidly as he acquired it. Surely, under such circumstances, it could reasonably be inferred that the cash in the box was no more than a small fraction of $33,000, much less $275,000.

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Although petitioner conceivably might have had a considerable amount of cash in the safe deposit box, the defense failed to present evidence to that effect during the trial. On the contrary, he refused to permit examination of the box by the Treasury agents (*supra*, pp. 33–35). Information as to the existence of such cash was peculiarly within the knowledge of petitioner and could easily have been presented by him. He contends, nevertheless, that the *possible* existence of considerable cash creates a fatal defect in the Government's case. This Court has stated, however, that "The general rule * * * is that it is not incumbent on the prosecution to adduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could readily be disproved by the production of documents or other evidence probably within the defendant's possession or control." *Rossi* v. *United States*, 289 U. S. 89, 91–92, and cases cited; *Guzik* v. *United States*, 54 F. 2d 618, 629 (C. A. 7); VIII Wigmore, *Evidence* (3d ed., 1940), Sec. 2273; II *id.*, Secs. 285–291. Certainly, if a jury may weigh the failure of an accused murderer to explain recent possession of property of the deceased,[44] if it may draw an inference of guilt from the unexplained possession of contraband narcotics,[45] it may also give weight to the failure

[44] *Wilson* v. *United States*, 162 U. S. 613, 619.

[45] *Yee Hem* v. *United States*, 268 U. S. 178, 185; *Dear Check Quong* v. *United States*, 160 F. 2d 251, 252–253 (C. A. D. C.).

of an accused taxpayer to produce evidence of the value of assets which he claims are sufficient to deprive the Government's case of substance.[46] The force of a *prima facie* case may not be defeated by "skillful concealment" (*United States* v. *Johnson, supra,* pp. 517–518), or by mere conjecture and speculation as to the possible existence of undisclosed assets. *Banks* v. *United States,* 204 F. 2d 666, 672 (C. A. 8), certiorari denied, 346 U. S. 857.[47]

It is clear from the foregoing that the Court of Appeals applied the proper test of the sufficiency of the evidence, and applied it properly to the facts of this case. It held that in a net worth case the accuracy of the Government's starting point must be established beyond a reasonable doubt, but it also held that the amount of cash in Box 48 could be disregarded because the Government's evidence permitted the jury to conclude that it was too small to have any substantial effect on the results of the net worth computation. The case was, therefore, properly submitted to the jury. *Curley* v. *United States,* 160 F. 2d 229, 232–233 (C. A. D. C.), certiorari

[46] Cf. *Bell* v. *United States,* 185 F. 2d 302, 309 (C. A. 4), certiorari denied, 340 U. S. 930.

[47] In any event, under the instructions given in this case, petitioner cannot complain that the jury may have attached undue significance to his failure to testify. The trial judge expressly charged (R. 152) that "no juror in this case should permit himself or herself to be to any extent influenced against the defendant because of, or on account of, his failure to testify as a witness in the case."

denied, 331 U. S. 837; *Gendelman* v. *United States,* 191 F. 2d 993, 995 (C. A. 9), certiorari denied, 342 U. S. 909; *Stoppelli* v. *United States,* 183 F. 2d 391 (C. A. 9), certiorari denied, 340 U. S. 864. As the Court of Appeals said in its opinion (R. 3765):

> If a defendant could prevent a case of this type from being submitted to the jury merely by stating he had further assets not taken into consideration by the Government, yet refusing to disclose them, enforcement of the tax evasion provisions of the Internal Revenue Code would be completely frustrated. Skillful concealment cannot be made an invincible barrier to proof. *United States* v. *Johnson* [319 U. S. 503], at 518.

Here, where the probative force of the Government's evidence has the support of both courts below and of the jury, the latter's verdict should not be set aside by this Court. *United States* v. *Johnson,* 319 U. S. 503, 518.[48]

[48] "Evidence which, if unexplained and uncontradicted, will justify a conclusion that a taxpayer had income which he deliberately failed to include in his return, is enough to take a case such as this to the jury. * * * If the skill of the tax evader in concealing income is not to become 'an invincible barrier to proof,' *United States* v. *Johnson*, *supra*, 319 U. S. at page 518, 63 S. Ct. at page 1240, 87 L. Ed. 1546, the federal appellate courts will have to rely heavily upon the sound judgment of the trial courts in appraising the sufficiency of the evidence to warrant submission of a tax evasion case to a jury, and upon the fairness and common sense of juries in determining guilt or innocence when such cases are submitted to them." *Schuermann* v. *United States*, 174 F. 2d 397, 399 (C. A. 8), certiorari denied, 338 U. S. 831.

Nor is there any direct conflict on this point with either *Bryan* v. *United States*, 175 F. 2d 223 (C. A. 5),[49] or *United States* v. *Fenwick*, 177 F. 2d 488 (C. A. 7). In each of these cases there was an incomplete investigation and the Government was forced to admit that there might well be assets which it had not discovered. See 175 F. 2d at 226; 177 F. 2d at 491. But here the agents' investigation was as complete as it could be, and though barred from direct information as to one asset by petitioner himself, they were able to develop enough evidence to negative the probability of any significant accumulation of cash.

2. The "markers" were properly included among petitioner's assets

One of petitioner's objections to the Government's net worth computation affects only the year 1945. Recognizing that the net worth method of proving income belongs in a different category from the cash and accrual methods of accounting, petitioner argues (Br. 17, 31–33) that, since the Government built up its net worth computation on the theory that he was a cash basis taxpayer, it erred in including alleged accrual items in the computation for the year 1945. For that year the Government included a bank roll of $20,000 among the assets of the *B-R Smoke Shoppe* (R. 3601), based on the testimony of

[49] Affirmed on another ground in *Bryan* v. *United States*, 338 U. S. 552.

Pritchett that at the end of 1945 there was $5,000 cash on hand and $15,000 in "markers" representing unpaid bets (R. 1949, 1961, 1962, 1968). Petitioner insists that the markers were accounts receivable, and hence were accrual items which should not have been included in a computation based on cash receipts. Arguing that the $15,000 was improperly included, he points to the fact that the Government's computation showed unreported income of only $11,747.04 for 1945 (R. 3601–3613) and concludes that the conviction cannot be sustained as to the third and fourth counts.

It should be noted that this argument, even if valid, could result only in a cancellation of the $5,000 fines imposed under the third and fourth counts. The general prison sentence of five years (*supra*, p. 6) would still be supported by either of the first two counts. *Hirabayashi* v. *United States*, 320 U. S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U. S. 640, 641–642.

We agree with petitioner that when the Government sets out to prove a taxpayer's income by computing the increases in his net worth, it should, in determining how much of this income is attributable to the taxable year in question, stick consistently either to the cash method or to the accrual method of accounting. We do not agree with petitioner that the markers in this case were accrual items. On the contrary there was evidence from which the jury could properly have concluded that they were the equivalent of

cash on hand and were so treated by petitioner and his associates. During the cross-examination of the Government's expert accountant, Weaver, by defense counsel the following occurred:

> Q. In computing net income on net worth method is it important to determine whether you are using the cash receipts and disbursements method of accounting rather than the accrual method of accounting?
>
> A. Yes. [R. 2615.]
>
> * * * * *
>
> Q. In computing the net income of a taxpayer on the net worth method, if there was money owed to him on account of business transactions which he had had at the end of the period covered by your net worth computation, the result which you would reach would be different if you used the cash method than if you used the accrual method, would it not?
>
> A. Yes, the result in the two methods should be different. It might turn out to be the same in some instances. [R. 2618.]
>
> * * * * *
>
> Q. As to any particular time that you were making the net worth computation, you would include the accounts receivable if the taxpayer were on accrual method?
>
> A. Yes.
>
> Q. But you exclude accounts receivable if the taxpayer were on the cash method, would you not?

A. Not necessarily. It depends what the accounts receivable arose from. [R. 2619.]

* * * * *

Q. If accounts receivable arose from the credit extended to customers in the course of a business, then on the cash method you would exclude those accounts receivable in computing the net worth as of that time?

A. If they arose from extension of credit for the sale of merchandise. *If they arose from the extension of cash loans, the situation would be different.* [R. 2620.] [Italics added.]

Petitioner apparently recognizes (Pet. 25; Br. 33) that accounts receivable which arise from loans or advances of cash are not accrual items, but are actually cash items. Weaver testified repeatedly that all the markers in this case were treated by petitioner and his associates as cash and that they represented advances of cash, i. e., loans of cash on hand. He based his conclusion on testimony which indicated that it was the custom in petitioner's gambling enterprises to advance loans from cash on hand, and to count markers as a part of the bank roll of the particular enterprise and to treat them as cash at the year's end. (R. 2494–2498, 2619–2626, 2722–2724, 2772–2782).[20]

[20] Weaver, the Government's accountant, made it abundantly clear, on cross-examination by defense counsel, that he recognized the distinction between (a) an account receivable representing a mere promise to pay by a bettor who has lost—which is not treated as income to a cash-

Thus, Lando testified that when any of the so-called partners in the *B-R Smoke Shoppe* wanted to withdraw funds during the year they deposited a marker in the amount withdrawn, and that when accounts were settled at the end of the year

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basis taxpayer until actually paid, and (b) an account receivable representing an exchange of one asset for another, *e. g.*, a loan of cash to a bettor in exchange for a promise to repay—which does not result in taxable income to the lender upon repayment of the loan. He testified (R. 2723–2724):

> A. To explain the difference between accounts receivable that arise as the result of exchange of one asset for another. For example, if you had ten thousand dollars cash on hand at the beginning of the year. During the year some one borrowed that money from you, you would no longer have ten thousand dollars cash in hand at the end of the year, but if we had to show any asset at the end of the year, our statement would reflect a loss of ten thousand dollars, which obviously would be incorrect, since your assets have not changed at all in amount, they have only changed in character. You have substituted ten thousand dollars cash and got ten thousand dollars accounts receivable. *That is exactly the same situation with respect to these markers. They have been exchanged for cash.* Now if the asset arises as the result of the receipt of income, or if the liability arises as the result of payment [or] in incurrence of an expense, then you have items which are not properly taken into account on net worth basis, if the taxpayer is reporting—
>
> Mr. AVAKIAN. This is no explanation. This is a lecture on unrelated matters.
>
> The COURT. Your point is not well taken. You may proceed if you have any further explanation you want to make.
>
> A. I merely wanted to say finally that this is the reason you must make a distinction between cash re-

the markers were considered part of the bank roll and the accumulated profits. (R. 1298–1300; cf. 1333, 1343–1344.) Kyne also testified that such markers were treated as cash. (R. 1374–1375.) Pritchett testified concerning the markers of bettors who lost to the *B-R Smoke Shoppe* without indicating how they were treated accounting-wise.[51] (R. 1949, 1961, 1962, 1968.) Both Maundrell and Busterna testified that the markers of losing bettors at the *Menlo Club* and the *186 Club* represented loans of cash, and were treated as cash and included in the amount of the bank roll. (R. 1627–1629, 1751, 1775–1776, 1886–1887, 1895–1896, 2018, 2021–2022; cf. 1445–1449.) Lando testified that bets were sometimes placed at the race track, and that "lay-off" bets were placed with and received from other bookmakers throughout the country (R. 1294–1295). The bets accepted by the *B-R Smoke Shoppe* itself formed a "pool" in which the amount paid the winners depended on the total amount bet. (R. 1289–1292.) Consequently, as Weaver testified,

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ceivable accounts and cash payable as to the source from which they arise, and you can not take into account, in determining net income under the net worth method, where the cash basis of reporting is used, any assets or liabilities that arise as the result of the receipt of income or the incurrence of expense, because to do so would give you an incorrect result. [Italics added.]

[51] At petitioner's orders, Pritchett had destroyed all records made while he was in charge of the business. (R. 1946, 1965–1966.)

the house advanced the amount of cash required to complete the "pool." (R. 2772–2782.) The jury, we submit, were thus amply justified in concluding from the evidence that it was customary in the gambling enterprises to treat markers as cash, and that they were items properly to be included in petitioner's assets, in computing increases in his net worth, as equivalent to cash on hand.

In any event, the evidence establishes a substantial amount of unreported income for the year 1945, even if the $15,000 in markers were eliminated entirely from the computation. There are several reasons for this:

1. Since the Government's computation showed an understatement of $11,747.04, elimination of the $15,000 would result in an overstatement of approximately $3,200. The Government included no figure at all for living expenses in its computation. On the other hand, the Government specifically proved that petitioner spent approximately $3,200 during 1945 for such nondeductible items as clothing, jewelry and hotel bills (R. 615, 619, 824, 843, 986, 1202–1204, 1212), and there was considerable evidence to indicate that his style of living was lavish (R. 615). In view of the necessary conclusion that petitioner must have spent a substantial sum for ordinary living expenses in addition to the $3,200 proved, there was still enough evidence to support the

verdict even if the markers are excluded from the computation.

2. Petitioner himself submitted a net worth computation for the *B-R Smoke Shoppe* which showed essentially the same net worth increase as that submitted by the Government. (R. 3628–3629.) He eliminated the $15,000 bank roll entirely at the starting point on the ground that the Government merely assumed its existence, and he eliminated $15,000 of the $20,000 shown by the Government at the end of 1945. The result is a net worth increase for the *B-R Smoke Shoppe* of approximately $5,000, almost exactly that shown by the Government's computation. If petitioner's figures for the *B-R Smoke Shoppe* were substituted in the Government's computation of petitioner's net worth increases, there would be no appreciable difference in the end result. (Compare R. 3601, 3612–3613 with 3626–3629; and cf. 3287–3289, 3322–3334.) Consequently, even on petitioner's own figures, the jury's finding was warranted.

3. The evidence that the partnerships were shams was sufficient and the issue was properly submitted to the jury

The chief underlying factual issue at the trial was the ownership of four of the San Francisco enterprises, *B-R Smoke Shoppe, 110 Eddy Street, Day-Night Cigar and Liquor Store* and *Menlo Club*. The amounts ascribed to these enterprises make the essential difference between the Government's net worth computation (R. 3612–3613) and that submitted by petitioner (R. 3626–3628). The Government contended that the businesses were sham partnerships and that they actually belonged to petitioner alone. Petitioner contended that the evidence was insufficient to establish that the partnerships were mere shams (*supra*, p. 7), and he objected to the trial court's refusal to give his proposed instruction on the issue. (R. 83–84, 3496.) Both arguments were renewed in the Court of Appeals. (R. 3768–3769, 3775.) In this Court petitioner renews his attack (Br. 37–39) upon the sufficiency of the evidence. And he also argues (Br. 17–18, 33–41), for the first time, that the test for determining whether a partnership actually exists is so doubtful and uncertain that the issue should never have been submitted to the jury.

We shall address ourselves first to the latter contention, not raised in the courts below. To begin with, petitioner himself recognized in the trial court that the nature of the so-called partnerships was a question to be decided by the jury. During the argument on the motion for acquittal, while defense counsel was urging that there was no substantial evidence that the partnerships were shams, the following occurred (R. 3480):

> The COURT. The question of whether the partnership is a real partnership would be left to this jury.
>
> Mr. AVAKIAN. Your Honor, that should be left to the jury only if there is some reasonable basis upon which they could infer that the partnerships are phony.

And petitioner's proposed instruction on the issue contained the following language (R. 84):

> Accordingly, unless you are satisfied beyond a reasonable doubt that the defendant and his associates did not intend to operate said businesses as profit-sharing partners, you must treat the income of said businesses as partnership income and compute the defendant's tax only on his percentage share of the profits for each year.

Furthermore, petitioner's contention that the determination of the existence of a partnership is too difficult a question for a jury is squarely in conflict with this Court's holding that the issue simply involves the application of long settled principles of partnership law and is the type of

question which triers of fact are constantly called upon to decide. In *Commissioner* v. *Tower,* 327 U. S. 280, 287, this Court said that the question is—

> whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both. And their intention in this respect is a question of fact, to be determined from testimony disclosed by their "agreement, considered as a whole, and by their conduct in execution of its provisions." *Drennen* v. *London Assurance Co.,* 113 U. S. 51, 56; *Cox* v. *Hickman,* 8 H. L. Cas. 268. We see no reason why this general rule should not apply in tax cases where the Government challenges the existence of a partnership for tax purposes.

Three years later, in *Commissioner* v. *Culbertson,* 337 U. S. 733, 741–743, this Court repeated the above quotation from the *Tower* case and said:[22]

> The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the *Tower* case, but whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light

> on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise. *There is nothing new or particularly difficult about such a test. Triers of fact are constantly called upon to determine the intent* with which a person acted. * * * Whether the parties really intended to carry on business as partners is not, we think, any more difficult of determination or the manifestations of such intent any less perceptible than is ordinarily true of inquiries into the subjective.[53]

In this respect again, petitioner fails to give proper effect to the distinction between a civil action for recovery of taxes and a criminal prosecution for willful attempted evasion of taxes. In the criminal case, the burden is on the Government, if the prosecution is based on a sham partnership, to show absence of intent to form a partnership. Furthermore, even after it establishes the invalidity of the partnership, the Government must still show that the taxpayer knew the partnership was a sham and deliberately used it in an attempt to evade taxes. The basic assumption of petitioner's argument is that the offense with which he was charged was based upon his erroneous and mistaken interpretation of technical statutory provisions.[54] Obviously this was

[52] See also the concurring opinion of Mr. Justice Frankfurter, 337 U. S., pp. 749–754.

[53] Footnote omitted and emphasis supplied.

not the theory of the prosecution. The jury were instructed on the nature and effects of a partnership (R. 142, 143–144); they were instructed that bona fide mistakes should not be held against petitioner (R. 133); and they were instructed that they could not find him guilty unless they found beyond a reasonable doubt that he consciously, knowingly and intentionally attempted to evade his taxes and knew that he was doing wrong (R. 134–135, 139–141, 142–143, 146, 151–152, 155). The jury must have found against petitioner in all these respects so far as the years 1944 and 1945 were concerned. The issues submitted to the jury were no more difficult than those which must be decided in many criminal cases. *Spies* v. *United States,* 317 U. S. 492, 499–500.

The instructions actually given on the partnership issue (R. 142, 143–144), and the rejection of petitioner's proposed instruction (R. 83–84), were

[54] According to petitioner, the formation of a nominal partnership would prevent a jury from ever convicting any taxpayer, even though the very purpose for the adoption of the partnership form was evasion of taxes. Petitioner says (Br. 36), "Where, as here, a taxpayer joins with others in the conduct of certain enterprises, his liability to include all of the income in his individual return is so uncertain that *there is no basis on which a jury could properly convict him* of knowingly and willfully failing to report the entire partnership income with intent to defraud the revenue." [Emphasis supplied.] It seems obvious that taxpayers cannot be afforded such a blanket immunity from prosecution where a willful and fraudulent intent to evade tax is proved, as in this case.

correct. The jury must, of course, be instructed on all the essentials of the offense alleged to have been committed, and there can be no doubt that the defendant is entitled to a clear instruction on the law pertaining to his theory of the defense.[55] On the other hand, the trial judge is under no affirmative obligation to state what the evidence is or to make any comments on the facts whatsoever,[56] and if he does so he should avoid undue emphasis upon any particular phase of the evidence.[57]

The trial court's action was clearly correct in the light of these principles. The jury's attention was specifically called to the partnership theory of the defense, and they were told how to deter-

[55] *Bird* v. *United States*, 180 U. S. 356, 361–362; *United States* v. *Marcus*, 166 F. 2d 497, 503–504 (C. A. 3); *Jones* v. *United States*, 164 F. 2d 398, 400 (C. A. 5); *Little* v. *United States*, 73 F. 2d 861, 867 (C. A. 10); *Fay* v. *United States*, 22 F. 2d 740, 742 (C. A. 9).

[56] *Stilson* v. *United States*, 250 U. S. 583, 588; *Todorow* v. *United States*, 173 F. 2d 439, 446 (C. A. 9), certiorari denied, 337 U. S. 925; *United States* v. *Cohen*, 145 F. 2d 82, 92–93 (C. A. 2), certiorari denied, 323 U. S. 799; *Arwood* v. *United States*, 134 F. 2d 1007, 1011 (C. A. 6), certiorari denied, 319 U. S. 776; *Williams* v. *United States*, 93 F. 2d 685, 692 (C. A. 9); cf. *Quercia* v. *United States*, 289 U. S. 466, 469–470.

[57] *Perovich* v. *United States*, 205 U. S. 86, 92; *Bird* v. *United States*, 187 U. S. 118, 130–131; *Coffin* v. *United States*, 162 U. S. 664, 674–675; *United States* v. *Pannell*, 178 F. 2d 98, 99 (C. A. 3), certiorari dismissed, 339 U. S. 927; *Boatright* v. *United States*, 105 F. 2d 737, 739 (C. A. 8); *Williams* v. *United States*, 93 F. 2d 685, 692 (C. A. 9); *Meadows* v. *United States*, 82 F. 2d 881, 884 (C. A. D. C.); *Urban* v. *United States*, 46 F. 2d 291, 293 (C. A. 10).

mine under the law whether a partnership actually existed and what the effects would be, tax-wise, if it did exist. There was no need to further particularize by describing the special type of partnership claimed by petitioner, and by telling the jury that this *would* be a partnership *if* they found that it met the test. This would have put emphasis upon the evidence for the defense without mention of the overwhelming evidence to show that no true partnership relationship was ever intended.[58] We submit that the Court of Appeals was correct in saying (R. 3775):

> The instruction requested by appellant, requiring the jury to find a valid partnership if certain testimony was believed, unduly emphasized particular phases of the evidence and would violate the rule that the question is one of fact to be decided from all the evidence.

Petitioner asserts (Br. 18, 37–39) that there is no evidence in the record that the four businesses were sham partnerships. He calls attention to the written agreements, the book entries of partners' equities, the withdrawal of cash by some of the partners other than petitioner. The written agreements were drawn up after the Government's

[58] It should be noted, in addition, that petitioner's proposed instruction does not fully reflect the written agreements which petitioner subscribed with Kyne and Maundrell in late 1946, after the investigation had begun. (R. 3582–3583, 3585–3586; Exs. 113 and 130.)

investigation had been instituted, and no partner, other than petitioner, withdrew any cash prior to that time except for the purpose of paying taxes or expenses of the businesses. Petitioner does not mention the voluminous evidence supporting the Government's position. We have summarized it in the Statement (*supra,* pp. 10–30), and there is no need to repeat it here. All the so-called partnership businesses were purchased with funds furnished by petitioner. Pratt, Nealis and Kopstick, the only others who contributed capital, were squeezed out at the earliest opportunity. There was a general manager, a main office, and Box 48 in which the funds of all the businesses were indiscriminately mingled with petitioner's personal funds. The so-called partners were told of their interests by petitioner, received no profits, and had no idea of the amount of "equities" credited to them. They were given only enough to pay the taxes on their supposed shares. Some of them did not even know who their fellow partners were. Cavani and Turner were supposed to be partners in *110 Eddy Street,* but Kyne had admitted prior to trial that they were simply employees. Petitioner, on the other hand, drew large sums from the businesses and from Box 48, and no record was kept of these withdrawals. The evidence is overwhelming that the so-called partners were simply employees of petitioner and that the "equities" credited to

them were a scheme designed to enable petitioner to evade a large part of his income taxes.[50]

III

THERE WAS NO ABUSE OF DISCRETION IN THE DENIAL OF PETITIONER'S MOTIONS UNDER RULES 16 AND 17

Petitioner contends (Br. 18–19, 41–45) that the trial court erred in denying his motions under Rules 16 and 17 of the Federal Rules of Criminal Procedure. (*Supra*, pp. 4–5.) An attempt is made to raise questions involving the scope of these rules in the light of this Court's decision in *Bowman Dairy Co.* v. *United States*, 341 U. S. 214. However, the trial court did not deny the motions because of the nature of the documents requested but because of the circumstances under which the motions were made, and the argument is, in essence, that the rulings constituted an abuse of discretion. The *Bowman Dairy* case, however, did not concern itself with

[50] Petitioner makes much of the proceeding in the Tax Court, *Remmer* v. *Commissioner*, Docket No. 23486. (Br. 6, 25, 39.) That proceeding has no bearing whatever on the criminal case. The deficiency notices which gave rise to the civil proceeding were issued by the Commissioner early in 1949, and the last Government pleading of any moment was filed in February 1950. As will be seen (*infra*, pp. 85–86), the investigation continued thereafter, and the indictment in this case was not filed until April 1951. Regardless of the earlier proceedings in the Tax Court, the Commissioner may always send out further 90-day letters asserting additional deficiencies in the case of fraud on the part of the taxpayer. See Section 272 (f), Internal Revenue Code (26 U. S. C. 1946 ed., Sec. 272).

questions of discretion but with the power of the District Court under the rules.[60]

The language of the rules specifically reposes a large measure of discretion in the trial court in dealing with requests for the discovery and inspection, or production, of books, papers, and other objects in possession of the Government.[61] Rule 16 provides that the court "may" allow inspection of such evidence "upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable." Rule 17 provides that the court "may" issue a subpoena directing the production of such material, but that the subpoena may be quashed "if compliance would be unreasonable or oppressive". We think a review of the circumstances which preceded these motions will satisfy the Court that the trial judge was well within his discretion in denying the motion to inspect and in quashing the subpoena.

As early as the first half of 1946, Internal Revenue agents began an investigation of the income tax returns of the *B–R Smoke Shoppe.* (R. 2115, 2123, 2152, 2163.) In the latter part of 1946 a special agent, whose duty it was to inves-

[60] The same is true of *Fryer* v. *United States*, 207 F. 2d 134 (C. A. D. C.), certiorari denied, 346 U. S. 885. *Gordon* v. *United States*, 344 U. S. 414, involved a motion to produce a specific document made during the course of the trial.

[61] See *Webb* v. *United States*, 191 F. 2d 512, 515 (C. A. 10); *United States* v. *Schiller*, 187 F. 2d 572, 575 (C. A. 2); *United States* v. *Schneiderman*, 104 F. Supp. 405 (S. D. Cal.).

tigate possible criminal tax evasion, was assigned to the case, and by July 1947 the agents were examining the returns of petitioner and of all the above-named enterprises. (R. 1249, 2423, 2454–2458.) The agents had numerous interviews during 1946 and 1947 with Kyne and with the two bookkeepers, Slater and Maundrell. Kyne, Slater, and Maundrell gave considerable oral information and turned over, freely and voluntarily, a large quantity of business records, although they were unwilling or unable, as has been stated (*supra,* pp. 18, 19–20, 33–34, 35), to give any information about petitioner's personal finances. The agents took the records to their own offices for study, promising that they would be returned when the investigation was complete and that Kyne and Maundrell could have access to them in the meanwhile. On several occasions Kyne and Maundrell obtained some of the records and then brought them back to the agents. As has been shown (*supra,* p. 13), a page in one of the *Menlo Club* books was altered before it was returned. In addition, Maundrell did not return some of the records of the *186 Club.* (R. 1528–1530, 1640–1643, 1813–1815, 2123–2126, 2154–2155, 2165–2166, 2199–2200, 2449–2451, 2695–2698, 2783.)

The agents repeatedly pointed out to Kyne that the records of the enterprises were inadequate in many respects, but Kyne could not enlighten them. They sought permission to examine the

contents of the safety deposit boxes, but this was refused by Kyne. Finally, at the agents' request, Kyne arranged an interview with petitioner on April 8, 1948, in the office of petitioner's then attorney, Thatcher. Thatcher asked whether the agents had any specific charges and whether they intended to recommend criminal prosecution. He did not ask what accounting problems they were concerned with. When the agents said that they had no authority to make charges and could make no recommendation until they had completed their investigation, Thatcher instructed petitioner not to answer any questions, terminated the interview, and handed to the agents a statement which he had prepared before the agents arrived. There was no claim of self-incrimination. Thereafter, Thatcher, of his own accord, turned over further records of petitioner to the agents. The agents were never able to communicate with petitioner himself during the course of the investigation. (R. 2496, 2558–2572, 3045, 3067–3068, 3619; Ex. G–1.) The special agent did not complete his investigation and submit his report recommending criminal prosecution until November 10, 1949. (R. 2577.)

Several months previously, however, the Bureau of Internal Revenue had begun a civil proceeding for recovery of income taxes, and had issued 90-day letters alleging an understatement of net income for 1944, 1945, and 1946 in the approximate amount of $487,000 and specifying the

businesses from which this arose. (R. 30–32.) A jeopardy assessment was levied against petitioner's assets in March 1949. (R. 3059.) On June 2, 1949, Lawrence Semenza, a certified public accountant, filed a power of attorney with the Treasury Department authorizing him to represent petitioner. (R. 37, 909–910.) On July 11, 1949, Semenza, at his own request, was taken into a room where the agents were keeping the records which had been turned over to them; he was told he could take away anything he wanted; he selected those which he thought were pertinent to petitioner's civil liability for underpayment of taxes; and he signed a receipt and agreed to return the records to the agents. (R. 39, 901, 908–910, 919–920, 922.)

On February 14, 1950, petitioner was officially notified by the Bureau of Internal Revenue that criminal proceedings were being contemplated. (R. 3210.) In March he employed two of the attorneys who represented him at the trial, Messrs. Golden and Gillen, together with a second certified public accountant, Friedman. (R. 37.) There was a conference on the contemplated criminal proceeding on May 25, 1950, at which petitioner's representatives were informed that if they prepared a net worth statement they would be allowed to compare it with the one already prepared by the Bureau. (R. 38–39.) Friedman was allowed to see all the records remaining in the hands of the agents; he spent some time ex-

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amining them and was allowed to take some of them. (R. 39, 184–185, 3212–3213.) Furthermore, petitioner's attorneys instructed Semenza to turn over to Friedman all records pertaining to the San Francisco enterprises, and as late as October 30, 1950, the Government was told that Friedman was making an audit. (R. 39, 910.) In November 1950 Friedman withdrew from the case and left all the records in the hands of petitioner's attorneys. (R. 37, 910, 3224.) Shortly before the case was presented to the grand jury in April 1951, Semenza was asked by the agents to return the records in accordance with his agreement. He appeared before the grand jury and stated that petitioner's attorneys would not return them to him. (R. 911–912.) Petitioner's attorneys refused to give them up on the ground that they were petitioner's property. (R. 173–176.) The indictment was returned on April 9, 1951, and trial was set for November 7, 1951. (R. 8, 447.) Shortly after the indictment petitioner, as has been shown (*supra,* pp. 19–20), obtained the books of the El Cerrito businesses and they were not available at the trial.

On June 15, 1951, during the course of a hearing on a motion for a bill of particulars, the question of examination by petitioner of the records in the Government's hands was discussed informally, and counsel for petitioner were told to apply to the court if they failed to receive cooperation from the Government. (R. 194, 285.)

But no action was taken on the court's suggestion until October 22, 1951, when defense counsel asked the prosecutor, Mr. Campbell, that they be allowed to examine the records which still remained in the agents' hands. (R. 26–28.) The prosecutor agreed to do this, provided a showing was made of petitioner's interest in the records, and provided the written consent of the parties who had turned them over to the Government was obtained. (R. 40–41.) Meanwhile, the records which had been given by Friedman to petitioner's attorneys were returned by them to Semenza. (R. 912.)

On November 14, 1951,[62] petitioner filed a motion under Rule 16, Federal Rules of Criminal Procedure, to inspect and take copies of the records in the Government's possession. It was alleged that a tremendous amount of accounting work would be required to prepare for trial, and that petitioner had been without an accountant until he obtained the services of Semenza in September 1951. A continuance of the trial was requested until April. (R. 16–34.) After a hearing (R. 157–198), the court denied the motion to inspect on the ground that petitioner had had ample opportunity since May 1950, through Friedman, to inspect all records in the Government's possession (R. 194–198). Referring to Friedman's examination, the court said, "The defendant has

[62] The trial date had been postponed to November 28, because the judge was engaged in other matters. (R. 180, 264.)

had all the benefits that the Court could give, the benefit by an order under Rule 16." (R. 196.) He also pointed out that petitioner had given no satisfactory explanation for withholding until the last minute a request which purportedly would cause a long delay in the proceedings.[63] (R. 197–198.)

On November 27, 1951, the day before the trial, petitioner presented a motion under Rule 17, Federal Rules of Criminal Procedure, for production and inspection of the records in the Government's possession, together with a subpoena to produce the records. (R. 42–54.) After a hearing (R. 241–288), the subpoena was quashed and the motion was denied on the ground that, under the circumstances, it was unreasonable to delay making it until the day before the trial (R. 286–287). The court assured defense counsel that they would be allowed ample time during the trial to examine each document offered by the Government. (R. 287–288.)

Upon request by the Government a subpoena was issued to Semenza to produce the records in his possession, but he appeared at the trial and stated that they had again been taken from him by petitioner's attorneys. The court ordered them turned over to the clerk, and they were made available to both sides for the duration of

[63] The explanation was that petitioner was without funds to pay for an audit by Friedman. There was no evidence whatsoever to support this assertion. (R. 197–198.) It was merely asserted by counsel.

the trial. (R. 912–929.) As to the records in the Government's possession, specific documents were, as we have already shown (*supra,* p. 48), promptly produced during the trial when requested by the defense.

In summary, petitioner knew, at least as early as April 1948, that a criminal proceeding was possible. Two of his accountants, Semenza in July 1949 and Friedman in May 1950, examined the records in the Government's hands, and Friedman had been specifically retained to look into the criminal aspect of petitioner's tax problems. Defense counsel were told five months before the date set for trial to request a court order if the Government would not cooperate with them, but Government counsel were not approached until about two weeks before the original trial date. Then, instead of complying with the simple conditions imposed by the Government, petitioner filed the two motions shortly before trial and asked a continuance of four months. Under these circumstances the Court of Appeals was clearly correct in holding that there had been no abuse of discretion in the denial of the motions. (R. 3752–3758.)

Under Rule 16 the trial court may, upon the making of a reasonable request, permit a defendant to inspect documents in the hands of the Government which belong to him. Petitioner, as the trial court pointed out, had already had the benefits of an order under the rule since all the

documents in the Government's possession had been examined by Semenza and Friedman. Moreover, it is quite clear that a further inspection would have been permitted had any reasonable request been made therefor, yet, although seven months intervened between indictment and the date set for trial, petitioner waited until the eleventh hour to approach the Government. Counsel conceded that access to the records had never been denied before November 7, 1951. (R. 2975.) But, instead of complying with the reasonable conditions imposed by the Government at that time,[64] petitioner informed the trial court that a four months' continuance would be necessary to enable him to examine and analyze all the documents. By no stretch of the imagination can this be called compliance with the spirit of Rules 16 and 17 which, as this Court pointed out in the *Bowman Dairy* case, were adopted in the interest of orderly and expeditious trial procedure. (341 U. S., pp. 219, 220.) See Note, 67 Harv. L. Rev. 492 (1954).

Rule 17 was destined to establish a more liberal policy for the production of evidentiary materials held by the Government, in order to enable

[64] Since the records had been turned over voluntarily by Kyne and Maundrell, and since it appeared that they claimed partnership interests, the Government properly requested that their written consent to the inspection be obtained. It is obvious that petitioner knew who his associates were and who had turned the records over to the Government.

the defendant to put them in evidence should the Government fail to do so. *Bowman Dairy Co.* v. *United States,* 341 U. S., pp. 219–221. "Its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of the subpoenaed materials." 341 U. S., p. 220. If, however, the defendant's action is not a "good-faith effort" to obtain evidence, the trial court may quash the subpoena. *Ibid.* Petitioner waited until the very day before trial, already delayed for three weeks, to file his motion for production, and he coupled with it a request that a time and place be appointed for inspection of the produced material by his attorneys and accountants. This would of necessity have interfered with the voluminous exhibits already prepared by the Government for the trial. Furthermore, in view of the considerable quantity of the records in the Government's possession (R. 48), petitioner would certainly have insisted that a proper inspection could not be made without a further lengthy continuance. We do not see how such belated maneuvers can profess to be a "good-faith effort" to obtain evidence. The inference is justified that petitioner's object was not to obtain evidence or to prepare a legitimate defense, but rather to cause delay and to sow the seeds of possible error for later harvest on appeal.

This conclusion is fortified by the complete absence of the slightest showing of prejudice. Professing not to know what records the prosecution

had (R. 272, 317), petitioner assumes the existence of something beneficial to the defense (R. 3469). His accountants had twice examined the records. Every record specifically requested during the trial was promptly produced by the Government. And surely petitioner would have known, as the trial judge pointed out (R. 3469–3475), what specific records were to his advantage. But there is nothing to indicate that petitioner was deprived of anything that would have materially aided his defense. We submit that both motions were properly denied as unreasonable under the circumstances.

IV

THE GOVERNMENT DOES NOT OPPOSE REMAND OF THE CASE TO THE DISTRICT COURT FOR THE PURPOSE OF HOLDING A HEARING TO INQUIRE INTO THE FACTS CONCERNING THE ALLEGED IMPROPER CONTACT BETWEEN ONE OF THE JURORS AND A THIRD PERSON

In his motion for a new trial filed February 29, 1952 (R. 106–110), petitioner alleged that he "was substantially prejudiced and deprived of a fair trial by reason of the acts and conduct of the jury, the Court, the prosecuting attorneys and the Agents of the Federal Bureau of Investigation" regarding an alleged incident described in the accompanying affidavit of petitioner's counsel.

This affidavit (R. 111–120) contained the following allegations: That the trial of this case commenced on November 28, 1951; that the jury reached its verdicts on February 22, 1952; that on

February 23, 1952, petitioner's counsel first learned of the facts averred; that in December 1951, or January 1952, an unidentified person had a conversation with one of the jurors; that in the course of this conversation it was stated to the juror that he could profit by bringing in a verdict favorable to the defendant; that the juror promptly reported the substance of the conversation to the trial judge, who conferred with the prosecuting attorneys concerning the matter; that as a result the Federal Bureau of Investigation was requested to and did make an investigation of the incident and made a report thereon; that neither the judge nor the prosecuting attorneys related the incident to any of defendant's counsel, and the latter were kept in complete ignorance of the matter until the verdicts had been reached, and thereafter learned thereof only through the press; that, if defendant's counsel had been apprised of the situation, they would have moved for a mistrial and further would have requested that the juror involved be replaced by an alternate juror, for the reason that said juror, having had such conversation, would be apprehensive of being suspected and criticized were he to vote and attempt to have the other jurors vote for a verdict in favor of the defendant, and thus would be and was prejudiced against the defendant by reason of such conversation; and that the omission of the trial judge to bring the facts of this incident to the attention of defendant's counsel at the time

criminal cases that "Private communications, possibly prejudicial, between jurors and third persons * * * are absolutely forbidden, and invalidate the verdict, at least until their harmlessness is made to appear." *Mattox* v. *United States,* 146 U. S. 140, 150. Evidence of such communication gives rise to a presumption of prejudice, and the burden is on the Government to establish that the communication was harmless. *Wheaton* v. *United States,* 133 F. 2d 522 (C. A. 8). Where it is shown that a possibly prejudicial conversation has taken place during the trial between a juror and a third person, the Government believes that the appropriate procedure is for the trial court to probe the matter by a hearing, so that the question of possible prejudice can be determined on the basis of facts on the record. See *Ryan* v. *United States,* 191 F. 2d 779, 781 (C. A. D. C.) and cases cited.

In *Glasser* v. *United States,* 315 U. S. 60, this Court held that an affidavit in support of a new trial, alleging improper constitution of a jury, although not formally controverted, need not be taken as true in the absence of implied or actuai stipulation that it may be accepted as proof; and that it is incumbent upon the moving party to "introduce, or to offer, distinct evidence in support of the motion; the formal affidavit alone, even though uncontroverted, is not enough." (315 U. S. at p. 87.) In the instant case there was no "stipulation" that the facts set forth in the affi-

davit in support of the motion might be accepted as true. Nor was there any offer of "distinct evidence" by the petitioner. His counsel offered, as did Glasser, to prove their allegations, but made no actual tender of proof. Although, according to their affidavit, they learned of the alleged events six days prior to the filing of the motion, the record is barren of any indication that they attempted to secure affidavits from anyone personally acquainted with the facts. Instead, they appeared on the day set for imposition of sentence and requested the court to issue subpoenas for them, including a subpoena to the trial judge himself. (R. 109.)

However, we do not believe that the *Glasser* rule is controlling in the circumstances of this case. Under the *Mattox* doctrine, evidence of potentially prejudicial contact with a juror would alone suffice to shift to the Government the burden of establishing that prejudice was lacking. Although there was no stipulation that any contact took place, it was alleged in the affidavit that there was such contact, that it had been called to the attention of the prosecutor and the judge, and that the judge had caused an investigation of the incident to be made by an official investigative agency of the Government. (R. 111–120.) The silence of both the prosecutor and the court in the face of such allegations results in a situation not present in the *Glasser* case, where it was not alleged and there was no reason to assume that

either had knowledge of the facts set forth in the affidavit. Cf. *Wolf* v. *United States,* 292 Fed. 673, 678 (C. A. 6); *Hindman* v. *United States,* 292 Fed. 679 (C. A. 6).

In view of these circumstances, the Government does not oppose remand of the case to the district court for the purpose of holding a hearing to inquire into the facts concerning the alleged incident.

CONCLUSION

Petitioner was properly convicted and the evidence was sufficient to warrant submission of the case to the jury and to support the verdict. The judgment of conviction should not be set aside. However, the Government does not oppose remand of the case to the district court for the purpose of holding a hearing, in connection with petitioner's motion for a new trial, to inquire into the facts concerning the alleged improper contact between one of the jurors and a third person.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

No. 304.—October Term, 1953.

Elmer F. Remmer, Petitioner, *v.* United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March 8, 1954.]

Mr. Justice Minton delivered the opinion of the Court.

The petitioner was convicted by a jury on several counts charging willful evasion of the payment of federal income taxes. A matter admitted by the Government to have been handled by the trial court in a manner that may have been prejudicial to the petitioner, and therefore confessed as error, is presented at the threshold and must be disposed of first.

After the jury had returned its verdict, the petitioner learned for the first time that during the trial a person unnamed had communicated with a certain juror, who afterwards became the jury foreman, and remarked to him that he could profit by bringing in a verdict favorable to the petitioner. The juror reported the incident to the judge, who informed the prosecuting attorneys and advised with them. As a result, the Federal Bureau of Investigation was requested to make an investigation and report, which was accordingly done. The F. B. I. report was considered by the judge and prosecutors alone, and they apparently concluded that the statement to the juror was made in jest, and nothing further was done or said about the matter. Neither the judge nor the prosecutors informed the petitioner of the incident, and he and his counsel first learned of the matter by reading of it in the newspapers after the verdict.

The above-stated facts were alleged in a motion for a new trial, together with an allegation that the petitioner was substantially prejudiced, thereby depriving him of a fair trial, and a request for a hearing to determine the circumstances surrounding the incident and its effect on the jury.* A supporting affidavit of the petitioner's attorneys recited the alleged occurrences and stated that if they had known of the incident they would have moved for a mistrial and requested that the juror in question be replaced by an alternate juror. Two newspaper articles reporting the incident were attached to the affidavit. The Government did not file answering affidavits. The District Court, without holding the requested hearing, denied the motion for a new trial. The Court of Appeals held that the District Court had not abused its discretion, since the petitioner had shown no prejudice to him. 205 F. 2d 277, 291. The case is here on writ of certiorari. 346 U. S. 884.

In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. *Mattox* v. *United States,* 146 U. S. 140, 148–150; *Wheaton* v. *United States,* 133 F. 2d 522, 527.

*The motion for a new trial was also grounded on many other contentions, several of which have also been presented to this Court. Because of our disposition of the case on the issue treated herein, we do not pass upon these additional questions.

We do not know from this record, nor does the petitioner know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless. The sending of an F. B. I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the F. B. I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions. The trial court should not decide and take final action *ex parte* on information such as was received in this case, but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.

We therefore vacate the judgment of the Court of Appeals and remand the case to the District Court with directions to hold a hearing to determine whether the incident complained of was harmful to the petitioner, and if after hearing it is found to have been harmful, to grant a new trial.

Judgment vacated.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.